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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 61

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

vs.

SEATRAIN LINES, INC.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF DELAWARE

FILED MARCH 18, 1946

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1 In the District Court of the United States for the District of Delaware

Civil Action No. 579

SEATRAIN LINES, INC.

vs.

UNITED STATES OF AMERICA

Docket entries

1. May 12, 1945—Complaint filed; same day summons issued (Exit copies to Marshal).
2. May 15, 1945—Marshal returns on summons marked. Served 5/12/45, filed.
3. June 2, 1945—Order calling Circuit Judge Biggs and Circuit Judge McLaughlin to constitute a court to hear this cause, filed (Exit copies).
4. June 15, 1945—Answer of United States, filed.
5. June 22, 1945—Intervention of Interstate Commerce Commission, filed.
6. June 22, 1945—Answer of Interstate Commerce Commission, filed.

H July 20, 1945—Hearing on petition to set aside and annul the order of Interstate Commerce Commission.

7. July 27, 1945—Transcript of hearing of July 20, 1945, filed.
8. Aug. 8, 1945—Reply Brief of Interstate Commerce Commission, filed.
9. Aug. 13, 1945—Brief of United States, filed.
10. Aug. 22, 1945—Reply brief of plaintiff, filed.
11. Oct. 3, 1945—Findings of Fact and Conclusions of Law suggested by United States and Interstate Commerce Commission, filed.
12. Oct. 3, 1945—Plaintiff's proposed Findings of Fact and Conclusions of Law, filed.
13. Jan. 30, 1946—Opinion of the Court, filed (Notice to counsel).
14. Jan. 30, 1946—Findings of Fact and Conclusions of Law, filed (Notice to counsel).

2 15. Feb. 7, 1946—Final order of Judges, Biggs, McLaughlin & Leahy, filed.

15a. Feb. 27, 1946—Petition of U. S. for an appeal, filed.
16. Feb. 27, 1946—Order Leahy, J. allowing the appeal, filed.
17. Feb. 27, 1946—Notice of appeal to Supreme Court of U. S. filed. (Notice to counsel)
18. Feb. 27, 1946—Citation on appeal, filed.

19. Feb. 27, 1946—Order of Court authorizing forwarding of original exhibits to Supreme Court, filed.
20. Feb. 27, 1946—Jurisdictional statement by defendant under Rule 12 of Revised Rules of the Supreme Court of U. S. filed.
21. Feb. 27, 1946—Assignment of Errors, filed.
22. Feb. 27, 1946—Notice to Attorney General of State of Delaware re appeal, filed.
23. Feb. 27, 1946—Statement by defendant-appellant directing attention to Paragraph 3 of Rule 12 of Revised Rules of Supreme Court of U. S. filed.
24. Feb. 27, 1946—Designation of defendant of record on appeal, filed.
25. Mar. 12, 1946—Motion of plaintiff to dismiss or affirm, filed.

4 In the District Court of the United States for the District of Delaware

Civil No. 579

SEATRAIN LINES, INC., PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

Petition

To the Honorable the Judges of the District Court of the United States for the District of Delaware:

Now comes Seatrain Lines, Inc., plaintiff, and presents its petition and alleges as follows:

THE PARTIES

1. Plaintiff, hereinafter for brevity sometimes referred to as Seatrain, is a corporation organized and existing under the laws of the State of Delaware, with an office at 100 West Tenth Street, Wilmington, Delaware, and with its principal operating office at No. 39 Broadway, Borough of Manhattan, City, County, and State of New York, and is a resident and citizen of the State of Delaware.

2. Plaintiff is a common carrier of property by water and since October 1932 has been engaged as a common carrier in the transportation of property by water in interstate commerce and in conjunction with various railroads has been engaged in the transportation of property by rail and water in interstate commerce over through routes.

3. Defendant is the United States of America.

THE JURISDICTION OF THE COURT

4. This suit is instituted under the provisions of Acts of Congress approved June 18, 1910 (36 Stat. L. 539); March 3, 1911 (36 Stat. L. 1148); and October 22, 1913 (38 Stat. L. 219, commonly referred to as the Commerce Court Act and the Urgent Deficiencies Act, as reenacted in Title 28, U. S. C., Section 41 (28) and Sections 43 to 48 inclusive, to enjoin, set aside and annul an order of the Interstate Commerce Commission (hereinafter referred to as the Commission) relating to transportation and issued in a proceeding of investigation of two applications filed with the Commission by plaintiff as hereinafter described. This suit is also brought under the general equity jurisdiction of this Court. The amount in controversy herein exceeds the sum of Three Thousand Dollars exclusive of interest and costs.

THE ORDER OF THE INTERSTATE COMMERCE COMMISSION SOUGHT TO BE ENJOINED, ANNULLED AND SET ASIDE

5. By the Transportation Act of 1940, approved September 18, 1940 (54 Stat. L. 929; U. S. C., Title 49, Section 901) Congress added to the Interstate Commerce Act Part III thereof, containing various provisions applicable to carriers by water. Included therein was Section 309, providing in part as follows:

"(a) Except as otherwise provided in this section and section 311, no common carrier by water shall engage in transportation subject to this part unless it holds a certificate of public convenience and necessity issued by the Commission: Provided, however, That, subject to section 310, if any such carrier or a predecessor in interest was in bona fide operation as a common carrier by water on January 1, 1940, over the route or routes or between the ports with respect to which application is made and has so operated since that time (or, if engaged in furnishing seasonal service only, was in bona fide operation during the seasonal period, prior to or including such date, for operations of the character in question) except, in either event, as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission as provided in subsection (b) of this section and prior to the expiration of one hundred and twenty days after this section takes effect. Pending the determination of any such application, the continuance of such operation shall be lawful. If the application for such certificate is not made within one hundred and twenty days after this section takes effect, it shall be decided in

accordance with the standards and procedure provided for in subsection (c), and such certificate shall be issued or denied accordingly. Any person, not included within the provisions of the foregoing proviso, who is engaged in transportation as a common carrier by water when this section takes effect may continue such operation for a period of one hundred and twenty days thereafter without a certificate, and, if application for such certificate is made to the Commission within such period, the continuance of such operation shall be lawful pending determination of such application.

"(b) Application for a certificate shall be made in writing to the Commission, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission shall, by regulations, require.

"(c) Subject to section 310, upon application as provided in this section the Commission shall issue a certificate to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if the Commission finds that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied.

"(d) Such certificate shall specify the route or routes over which, or the ports to and from which, such carrier is authorized to operate, and, at the time of issuance and from time to time thereafter, there shall be attached to the exercise of the privileges granted by such certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require, including terms, conditions, and limitations as to the extension of the route or routes of the carrier, and such other terms, and conditions, and limitations as are necessary to carry out, with respect to the operations of the carrier, the requirements of this part or those established by the Commission pursuant thereto: Provided, however, That no terms, conditions, or limitations shall restrict the right of the carrier to add to its equipment, facilities, or service within the scope of such certificate, as the development of the business and the demands of the public shall require, or the right of the carrier to extend its services over uncompleted portions of the waterway projects now or hereafter authorized by Congress, over the completed portions of which it already operates, as soon as such uncompleted portions are open for navigation.

"(e) No certificate issued under this part shall confer any proprietary or exclusive right or rights in the use of public waterways."

6. The order of the Commission sought to be enjoined, annulled and set aside is an order dated February 6, 1945, issued by the Commission in a proceeding before it entitled Seatrain Lines,
6 Inc., Common Carrier Applications, Docket No. W-543 upon the docket of the Commission, which proceeding was a proceeding of investigation by the Commission of two separate applications made to the Commission under the provisions of Section 309 above for the issuance to plaintiff of certificates of convenience and necessity. The said order was issued by the Commission pursuant to a report on reconsideration, likewise dated February 6, 1945, embodying certain conclusions and findings of the Commission. A copy of the order sought to be enjoined, annulled and set aside, entitled "Corrected Certificate and Order," is attached hereto as Exhibit A and made a part hereof. A copy of the report of the Commission on reconsideration and of the separate dissenting expressions of Commissioners Lee, Alldredge, and Patterson is attached hereto as Exhibit B and made a part hereof.

7. The order of the Commission of February 6, 1945, Exhibit A, and the so-called "Corrected Certificate" embodied therein, purport to cancel and supersede as of May 21, 1945 an order dated July 2, 1942 embodying a certificate issued to plaintiff upon its applications aforesaid and pursuant to a report and the findings and conclusions therein, likewise dated July 2, 1942, issued by the Commission through its Division 4. A copy of the certificate and order dated July 2, 1942 is attached hereto as Exhibit C and made a part hereof and a copy of the Commission's report of the same date is attached hereto as Exhibit D and likewise made a part hereof.

8. Although the Commission, over plaintiff's objections, has conducted its investigation upon plaintiff's applications in a single proceeding and both in its original report, Exhibit D, and its report on reconsideration, Exhibit B, embodied its conclusions and findings in a single report and pursuant thereto in each instance issued a single order, Exhibits C and A, nevertheless plaintiff's applications related to separate and distinct operations conducted by it as a common carrier by water, one between the port of New York and the port of New Orleans, La., and the other between the port of New York and the port of Texas City, Texas. Because of the circumstances under which the applications were made different issues were raised thereby for determination by the Commission. Accordingly, in this petition, for purposes of clarity, the facts and the grounds upon which it is alleged that the Commis-

sion's order, Exhibit A, should be enjoined, annulled and set aside will be separately stated with regard to each said operation and the application relating thereto.

WITH REGARD TO PLAINTIFF'S OPERATION BETWEEN NEW YORK AND NEW ORLEANS.

9. Since October 1932, except for interruption caused by the requisition of its vessels by the government for war uses, plaintiff has been continuously engaged in bona fide operation as a common carrier by water of property for compensation between the ports of New York and New Orleans, with its terminal in New York Harbor at Hoboken, N. J., and its terminal in New Orleans at Belle Chasse, La., and was in bona fide operation as such a carrier on January 1, 1940. In such operation and continuously since October 1932, and on January 1, 1940, plaintiff has held itself out to the general public as a common carrier of commodities generally and has held itself out to the general public to transport and has engaged in transporting commodities generally between the ports of New York and New Orleans.

10. Continuously since October 1932, and on January 1, 1940, plaintiff, in connection with its operation between New York and New Orleans, had on file with the Interstate Commerce Commission as notice to it and to the general public of its holding out and undertaking, tariff schedules setting forth its transportation undertakings and the terms and conditions under which it held itself out to accept and transport freight, describing its services, terminals and freight stations, and its rates for transportation. Such tariffs have been and are in the files and possession of the Interstate Commerce Commission and include, among others, tariffs bearing the following numbers:

Seatrain Lines, Inc. I. C. C. Nos. 10, 15, 20, 31 and 38.
Agent J. M. King's I. C. C. No. 3.
Agent F. D. Miller's I. C. C. No. 401.
Agent J. R. Peel's I. C. C. Nos. 3288, 3296, and 3367.
Agent W. S. Curlett's I. C. C. No. A-677.
Denver & Rio Grande Western R. R. I. C. C. No. 700.

Plaintiff, in lieu of incorporating its tariffs in this petition, will file copies thereof with the Court upon the trial of this action.

11. Since October 1932, the Commission has instituted and conducted various proceedings of investigation into and regarding plaintiff's operation between New York and New Orleans and the transportation in which plaintiff has thus been engaged, has taken a large amount of testimony with regard thereto, received numerous exhibits and briefs, and heard counsel on oral argument. In connection with some of said proceedings, the Commission on various occasions has also sent its own investigators

into the field and to plaintiff's offices and properties and elsewhere to investigate and report upon plaintiff's operation and the transportation engaged in by it.

These proceedings have included the following:

Investigation of Seatrain Lines, Docket No. 25565, with which was also heard a proceeding on the Application of the Missouri Pacific Railroad Company and Texas and Pacific Railway Company under Paragraphs 9, 10 and 11 of Section 5 of the Interstate Commerce Act, Docket No. 25546. In these proceedings the Commission received 2075 pages of testimony and 162 exhibits relating to plaintiff's operation and transportation and the public interest served thereby, and the Commission made and published two reports, 195 I. C. C. 215 (1933); 206 I. C. C. 328 (1935).

Seatrain Lines, Inc. v. The Akron, Canton & Youngstown Railway Company et al., Docket No. 25727, in which and in a related case, I. & S. Docket No. 4542, the Commission held hearings at which it received 2829 pages of testimony and 193 exhibits relating to the establishment of through routes and joint rates in connection with plaintiff, and the Commission made three reports, 226 I. C. C. 7 (1938); 243 I. C. C. 199 (1940); 259 I. C. C. 297 (1944).

Hoboken Manufacturers Railroad Company v. The Akron, Canton & Youngstown Railway Company et al., Docket No. 27630, in which the Commission received 526 pages of testimony and over 50 exhibits relating to the handling of freight, its receipt and delivery and method of interchange at New York Harbor between plaintiff, shippers, consignees and connecting carriers in New York Harbor. The Commission's report in this proceeding is published in 234 I. C. C. 114 (1939).

Hoboken Manufacturers Railroad Company v. Abilene & Southern Railway Company et al., Docket No. 25728, in which the Commission received 1403 pages of testimony and 80 exhibits relating to the movement of cars via plaintiff's vessels between New York and New Orleans and in which the Commission made four reports, 206 I. C. C. 328 (1935); 226 I. C. C. 7 (1938); 237 I. C. C. 97 (1940); 248 I. C. C. 109 (1941).

12. Pursuant to Section 309 above quoted in paragraph 5 hereof and the regulations issued by the Commission thereunder, plaintiff seasonably and on or about May 28, 1941 filed with the Commission on the form prescribed by it an application asking for the issuance to it, in accordance with the proviso of Section 309 (a), commonly called the "grandfather" clause, of a certificate of convenience and necessity authorizing it to engage in transportation as a common carrier by water of commodities generally between the ports of New York and New Orleans, in which transportation it was engaged on January 1, 1940 and

continuously thereafter, except for interruptions over which plaintiff had no control. The original and copies of this application were filed with and are in the possession of the Interstate Commerce Commission and plaintiff, in lieu of reproducing it herein, reserves the right to produce and file a copy with the Court at the trial of this action. Copies of this application were served as required by law and by the Commission's regulations thereunder upon the Governors of the several states concerned and notice of the filing of the application was, as required, served upon all water carriers known by plaintiff to be competitive with it, including the following:

Pan-Atlantic Steamship Corporation.

Southern Steamship Company.

Southern Pacific Company (Southern Pacific Steamship Lines "Morgan Line").

The Bull Steamship Line.

13. In its said application for a certificate under the "grandfather" clause with regard to its operation between the ports of New York and New Orleans, plaintiff described its operation and the transportation in which it was engaged as that of a common carrier by water of commodities generally. In accordance with the Commission's regulations and instructions and the form of application prescribed by it, plaintiff submitted as a part of its said application various supporting documents. Among said documents was an affidavit of E. K. Morse, Vice President of plaintiff, more fully describing plaintiff's operations and the transportation in which it was engaged, in which it was testified and the Commission was advised in part:

"In the operation of this weekly service applicant has been engaged as a common carrier by water in the transportation of freight generally in interstate commerce between the port of New York and the port of New Orleans and in connection with common carriers by rail has also been engaged in the transportation of freight over through routes by rail and water, water and rail, and rail, water, and rail between points in Eastern Trunk Line, New England, and Central Freight Association territories, including New York Harbor, on the one hand, and points in the South and Southwest, including New Orleans, Louisiana, on the other hand.

"For such transportation applicant has published and maintained, as required by law, tariff schedules naming a full line of class and commodity rates applicable to the transportation described and by such tariff schedules has held itself out to the general public as a common carrier by water to accept and transport freight of all kinds in accordance with the rules, regulations, and rates provided in said tariffs, subject to the legal rights,

obligations, and limitations governing transportation by common carriers by water."

Reference was thus made to the duly published tariffs of plaintiff on file with the Commission, referred to in paragraph 10 hereof, as proof and notice to the Commission of plaintiff's undertaking and holding out to the public. As further proof and information to the Commission and all interested parties regarding plaintiff's operation between New York and New Orleans and the transportation in which it was engaged, specific reference was made, as part of the proof in support of the application, to both the evidence before the Commission and the Commission's findings and reports in the proceedings listed and described in paragraph 11 hereof.

14. The Commission gave the proceeding upon this application of plaintiff its docket No. W–543.

15. The Commission thereafter requested plaintiff to furnish additional data and all data so requested was furnished. Subsequently investigators from the Commission's staff called at plaintiff's New York office, requested the records upon which the data so furnished were based and examined the same, and were furnished and examined such other records as they requested.

9 16. Before the Commission issued its report and order and the certificate prayed for, plaintiff's vessels were requisitioned by the United States for war purposes and the operation of plaintiff's service between New York and New Orleans was thus interrupted by causes over which plaintiff had no control, as the Commission thereafter found in its report as hereinafter set out.

17. No competing carrier nor any other party recorded any objection to the issuance to plaintiff of a certificate in the form applied for by it in its application.

18. On or about July 2, 1942 the Commission by Division 4, having fully and thoroughly investigated plaintiff's said application, as it was required by law to do, and all facts relevant thereto, and having carefully considered the same and the supporting documents and proof and the evidence and findings in the proceedings referred to, issued its report herein, dated July 2, 1942, Exhibit D, and pursuant thereto issued and served upon plaintiff its order of the same date, Exhibit C, whereby it certified and ordered, in part, as follows:

"It is hereby certified, That public convenience and necessity require the continuance of operations by Seatrain Lines, Inc., as a common carrier by self-propelled vessels, in interstate or foreign commerce, in the transportation of commodities generally between the ports of New York, N. Y., New Orleans, La., and Texas City, Tex., by way of the Atlantic Ocean and the Gulf of Mexico.

"It is ordered, That said carrier be, and it is hereby, authorized

to perform the service specified above, subject, however, to such terms, conditions, and limitations as are now, or may hereafter be, attached to the exercise of such authority by this Commission."

19. No protest against or objection to said findings and order was made by any common carrier competitor of plaintiff or by any other party and no request for reconsideration or modification was filed. Accordingly, the order and the certificate embodied therein, authorizing plaintiff "to perform the service" of "a common carrier by self-propelled vessels, in interstate or foreign commerce, in the transportation of commodities generally between the ports of New York, N. Y., New Orleans, La.," took effect as provided therein, on August 10, 1942 and said certificate has been in effect continuously since that time and has been and now is held by plaintiff and is now in effect in accordance with its terms.

20. Pursuant to said certificate and order and in fulfillment of the conditions therein provided, plaintiff has accepted the certificate and has exercised the authority specified therein, except as prevented by circumstances beyond its control, namely, the requisitioning and diversion of its vessels to war purposes.

21. Acting in reliance upon said certificate issued to it by the Commission's order of July 2, 1942 and pursuant to the conditions therein contained for the holding of said certificate, plaintiff, among other things, has at great expense maintained its organization, including its office and operating staffs; has maintained its terminals; has published and republished its tariff schedules; has maintained its membership in freight bureaus and tariff publishing agencies; has prosecuted or defended various proceedings affecting its rates and charges, the through movements of freight via its lines, the interchange of railroad cars and other matters essential to the performance of its service; has maintained its stock ownership in the Hoboken Manufacturers Railroad Company; has incurred great expense in arranging for a new and larger site for its terminal facilities in New York Harbor, all of which it has done in reliance upon the certificate and the terms thereof, as embodied in the Commission's said order of July 2, 1942, authorizing plaintiff to engage in transportation for the general public as a common carrier by water of commodities generally between New York and New Orleans.

22. Further in reliance upon the terms of the certificate embodied in the Commission's said order of July 2, 1942, plaintiff entered into an agreement with the Administrator of the War Shipping Administration, who had on October 6, 1942 requisitioned title to all of plaintiff's vessels, including all spare parts appurtenant thereto, whereby plaintiff consented to the determination by the Administrator that the use rather than the title of said vessels, their spare parts and appurtenances should be

deemed to have been requisitioned as of October 6, 1942 (Federal Register, April 28, 1943, p. 5572). By said agreement, plaintiff consented to and did reacquire title to its said vessels. Plaintiff would not have entered into this agreement nor have reacquired its said vessels on the terms provided for therein except in reliance upon the certificate issued by the Commission, as embodied in its order of July 2, 1942, authorizing plaintiff to engage in operation between the ports of New York and New Orleans in the transportation of commodities generally without restriction. The Commission was informed of the foregoing facts by letter and by the affidavit filed with it, attached hereto as Exhibit L, as hereinafter described.

23. On or about December 18, 1943, after said certificate had been held by plaintiff and had been in effect according to its terms for nearly a year and a half and after and notwithstanding that plaintiff had acted and incurred substantial expense and obligations in reliance thereon, as alleged in the foregoing paragraphs hereof, the Commission, through its Division 4, without any complaint or protest having been made to it, as plaintiff is informed and believes, and without any request therefor from any party, issued its order dated December 18, 1943, a copy of which is annexed hereto as Exhibit E and made a part hereof, whereby it purported to reopen the proceedings relating to plaintiff's application for certificates for reconsideration.

24. Thereafter counsel for plaintiff received from the Assistant Director of the Commission's Bureau of Water Carriers and Freight Forwarders a letter dated December 31, 1943, a copy of which is attached hereto as Exhibit F and made a part hereof. Accompanying said letter and referred to therein was a draft of a proposed report and of a proposed amended order embodying amended certificates, copies of which are attached hereto as Exhibits G and H, respectively, and made a part hereof, and counsel for plaintiff was requested to advise the Commission with reference to the proposals. On January 20, 1944, counsel for plaintiff, in response to the request, forwarded to the Assistant Director of the Commission's Bureau of Water Carriers and Freight Forwarders a letter, a copy of which is attached hereto marked Exhibit I and made a part hereof.

25. On or about January 27, 1944, Division 4 of the Commission issued a further order dated that day, a copy of which is annexed hereto as Exhibit J and made a part hereof, by which the Commission ordered that the proceeding upon plaintiff's applications be reopened

"for hearing upon the question of whether or not the said findings and certificate and order of July 2, 1942 should be modified so as to authorize applicant to continue to operate in service in

which it was engaged, except for interruptions beyond its control, namely, as a common carrier by the 'Seatrain' type of vessels in the transportation of liquid cargoes in bulk; of empty railroad cars, and of property loaded in freight cars received from and delivered to rail carriers and transported without transfer from the freight cars between the ports above mentioned" (New York, New Orleans and Texas City).

26. Pursuant to its said order of January 27, 1944, reopening the proceeding, the Commission by notice assigned the proceeding for hearing before Commissioner Porter and Examiner Copenhafer at Washington, D. C., on March 27, 1944.

27. On or about March 23, 1944, the plaintiff filed with the Commission a motion, a copy of which is attached hereto as Exhibit K and made a part hereof, whereby it prayed that the
11 Commission vacate and rescind its order reopening the proceeding and assigning it for hearing, on the ground that plaintiff had incurred substantial expense and had made important commitments pursuant to and in reliance upon the certificate as issued by the Commission's order of July 2, 1942, that the Commission was without authority to cancel, alter or amend said certificate so as to revoke or restrict the rights, authorization and privileges held by plaintiff thereunder, and that any attempt so to do would take plaintiff's property without due process of law.

28. When the proceeding was called for hearing on March 27, 1944, pursuant to the notice described in paragraph 26 hereof, counsel for plaintiff renewed the motion that the Commission vacate and rescind its order of January 27, 1944, reopening the proceeding. Commissioner Porter, presiding at the hearing, overruled the motion and an appeal was taken from that ruling to the Commission, objection being made that the Commission was without authority to revoke an authorization and privileges granted by the terms of a certificate which had been issued and become effective and in reliance upon which the holder had acted and incurred expense and obligations, when there was no failure to make full disclosure to the Commission of all pertinent facts in support of the application and no fraud or misrepresentation was present in connection with the application for or issuance of the certificate. Prior to this hearing there was filed with the Commission as part of the record in the proceeding an affidavit of Graham M. Brush, President of plaintiff, a copy of which, marked Exhibit L, is attached hereto and made a part hereof. By order dated April 3, 1944, a copy of which is attached hereto as Exhibit M and made a part hereof, the Commission overruled plaintiff's motion.

29. On or about April 21, 1944, plaintiff filed with the Commission a petition, a copy of which is attached hereto as Exhibit N

and made a part hereof, whereby it prayed the Commission to reconsider its said order of April 3, 1944 overruling plaintiff's motion of March 23, 1944.

30. The Commission by notice dated April 8, 1944 assigned the proceeding pursuant to its order of reopening, for hearing on April 24, 1944. At the time of such hearing counsel for plaintiff appeared for the purpose of again challenging the jurisdiction of the Commission to revoke the authorization and privileges granted by a certificate which had been issued and had taken effect and in reliance upon which plaintiff had incurred expense and undertaken obligations. Counsel for plaintiff also advised the Commission that plaintiff did not concede and would challenge the Commission's jurisdiction to specify in a certificate the manner in which a water carrier may conduct its service. The presiding Commissioner at said hearing announced that the Commission would have before it and would take into consideration the cases referred to by plaintiff in its applications and incorporated therein, as described in paragraphs 15 and 18 hereof, and that the Commission would also have before it plaintiff's applications and all of the material and supporting documents filed by plaintiff in support of its applications, either at the time said applications were filed or subsequently thereto, together with a letter and report of the Commission's examiner. Thereupon the following colloquy took place between counsel for plaintiff and the presiding Commissioner:

"Mr. McCollester. * * * If I correctly understand, all of the material to which Your Honor has referred, is material which was presented in connection with the applications considered by the Commission in issuing its order of July 2, 1942 which contains certificate and was the material upon which that certificate was based.

If that clearly appears, of course, we, ourselves, would want that. We want to have that clearly understood. The only objection we would have to the consideration by the Commission at this time, or the receipt for purposes of consideration of any evidence or material of any sort in the nature of factual information which was not before the Commission and was not considered by it in issuing the certificate.

12 Commr. Porter. Well, Counsel understands of course that the reports of the Commission to which I have referred and identified in the record here, were all matters of our records and were before us at the time, and were available to us at the time we issued the certificates.

Mr. McCollester. That is right.

Commr. Porter. And that is also true of these offers I have just

made of documents and letters directly connected with at the time of your application. They are all in the docket and they are, of course, subject to inspection and examination by respondent's Counsel at any time.

Mr. McCollester. Yes; and, of course, Mr. Commissioner, we take the position that the certificate was issued in the light of all of the facts disclosed thereby" (R. 30–31).

In view of the foregoing, and because of plaintiff's contention, to which it now adheres, that the Commission was without jurisdiction to revoke or modify the certificate, plaintiff offered no further evidence.

31. Thereafter briefs was filed and oral argument was presented to the entire Commission on July 21, 1944. Therein plaintiff challenged the power of the Commission to include in any certificate issued under Section 309 (c) to a carrier of commodities generally limitations specifying the kind of package, container, vehicle, craft, and the like which shall be used by such carrier for the transportation of such commodities in its vessels or limitations with regard to the parties from and to whom such a carrier may receive and deliver freight or the manner in which or the facilities by which such freight may be received and delivered by it. In brief and on oral argument, argument was also presented to the Commission challenging its jurisdiction to cancel a certificate issued under Section 309 with the result of revoking, limiting or restricting the authorization and privileges granted thereby after acceptance of such a certificate by the carrier and action by it in reliance thereon.

32. On or about February 6, 1945, the Commission with Commissioners Lee, Alldredge and Patterson dissenting, announced its decision and issued its report, Exhibit B. At the same time and pursuant to said decision and order, the Commission issued its order, Exhibit A, whereby it purported to cancel and supersede the certificate theretofore issued to plaintiff by it and embodied in its order of July 2, 1942, Exhiibt C, authorizing plaintiff to perform service

"as a common carrier by self-propelled vessels, in interstate or foreign commerce, in the transportation of commodities generally" and purported to limit the service which plaintiff would be authorized to perform to service

"as a common carrier by self-propelled vessels, in interstate or foreign commerce, in the transportation of liquid cargoes in bulk; of empty railroad cars; and of property loaded in railroad cars received from and delivered to rail carriers and transported without transfer from railroad cars."

33. With regard to plaintiff's operation between New York and

New Orleans, the Commission's said order of February 6, 1945, Exhibit A, which would cancel the certificate embodied in the Commission's order of July 2, 1942, Exhibit C, revoke the authorization and privileges granted thereby, and issue to plaintiff in lieu thereof a new and different certificate in the terms quoted in paragraph 32, is invalid, null and void and should be annulled and set aside and its enforcement should be enjoined for the reasons, among others:

(a) That it purports to limit plaintiff, as a common carrier of commodities generally, to the use of particular facilities on board its vessels for the transportation of freight, to specify the particular parties from whom plaintiff may review and to whom it may deliver such freight and the particular facilities to be used in, and the particular method of interchanging such freight with
13 such parties, whereas Section 309 confers upon the Commission no jurisdiction, without the consent of the carrier, so to limit the authorization of a common carrier or restrict the privileges granted by a certificate and provides that a certificate issued by the Commission to a common carrier by water shall specify only "the route or routes over which or the ports to and from which" the carrier "is authorized to operate."

(b) That even if the Commission had jurisdiction so to define or restrict the authorization and privileges granted to a common carrier by water by a certificate, nevertheless when, as here, the carrier has presented an application to the Commission under the "grandfather" clause on the form prescribed by the Commission and pursuant to its rules and regulations, and has therein correctly represented that on January 1, 1940 it was engaged in operation as a common carrier by water of commodities generally, and when the Commission, after investigation, has so found and has issued a certificate to the carrier in terms authorizing it to continue to engage in transportation as a common carrier by water of commodities generally, as the Commission did by the certificate embodied in its order of July 2, 1942, Exhibit C, and where such certificate has by its terms become effective and the carrier has accepted and has acted and incurred expense and obligations in reliance thereon, the Commission is without power thereafter to cancel the certificate originally issued or withdraw or restrict the authorization and privileges granted thereby.

WITH REGARD TO PLAINTIFF'S OPERATION BETWEEN NEW YORK AND TEXAS CITY

34. Since on or about May 1940, except for interruptions of service over which plaintiff had no control, plaintiff has been continuously engaged in bona fide operation as a common carrier of

property by water between the ports of New York and Texas City, Texas, and was so engaged on February 1 ,1941.

35. On or about May 28, 1941, pursuant to Section 309 quoted in paragraph 5 above, plaintiff seasonably filed with the Commission on the form prescribed by it an application, whereby it prayed a finding by the Commission that the present or future public convenience and necessity require the operation by plaintiff as a common carrier by water of commodities generally between the ports of New York and Texas City and prayed the issuance by the Commission to it of a certificate of convenience and necessity authorizing such operation. The original and copies of this application were filed with and are in the possession of the Interstate Commerce Commission and plaintiff in lieu of reproducing said application herein reserves the right to produce and file a copy thereof with the Court at the trial of this action. Copies of this application were served as required by law and by the Commission's regulations thereunder upon the Governors of the several States concerned and notice of the filing of the application was, as required, served upon all water carriers known by plaintiff to be competitive with it, including the following:

Pan-Atlantic Steamship Corporation.

Southern Steamship Company.

Southern Pacific Company (Southern Pacific Steamship Lines "Morgan Line").

The Bull Steamship Line.

36. In its said application, described in the foregoing paragraph 35, with regard to its operation between the ports of New York and Texas City, plaintiff described the transportation for which it sought a certificate as "the transportation of commodities generally."

37. In accordance with the Commission's regulations and instructions and the form of application prescribed by it, plaintiff submitted as a part of its said application various supporting documents. These documents included an affidavit of E. K. Morse, Vice President of plaintiff, describing the operation of plaintiff for which a certificate was sought by said application and referring to the tariff schedules published and filed
14 with the Commission by plaintiff naming the rates, rules and regulations in connection with the transportation of freight generally in interstate commerce between the port of New York and the port of Texas City, in port to port movement, and over through routes by rail and water, water and rail, and rail, water and rail, as well as the terminal tariffs of plaintiff. By said tariff schedules, plaintiff had held itself out to the general public and undertaken to transport commodities generally at the rates and under the rules and regulations set forth therein.

Among others, the tariff schedules referred to included the following:

Seatrain Lines, Inc. I. C. C. Nos. 28 and 38;
Agent J. R. Peel's I. C. C. Nos. 3296 and 3367;
Denver & Rio Grande Western R. R. I. C. C. No. 700;
New Orleans, Texas & Mexico Ry. I. C. C. No. A–1218.

Plaintiff reserves the right to present copies of its tariff schedules to the Court upon the trial of this action. For the further information of the Commission as to the nature of the operation for which authority was sought and as proof that the proposed operation was required by the public convenience and necessity, the Commission's attention was directed and reference was made to the findings of the Commission and to the evidence before it in a proceeding entitled Application of the Missouri Pacific Railroad Company and Texas and Pacific Railway Company, Docket No. 25546 upon the docket of the Commission. In said proceeding, the Commission had entered upon an investigation and conducted hearings with regard to plaintiff's proposed operation between Texas City and New York, and in the course of said hearings a great deal of evidence was presented to the Commission with regard to plaintiff's then proposed operation, the need of shippers therefor and the advantages thereof to the public. Plaintiff referred also to sailing schedules showing published sailings of plaintiff's vessels, which were actually performed in accordance therewith.

38. The Commission gave the proceeding upon this application the same docket number which it had given to the proceeding upon the application described in paragraph 12 hereof, namely, Docket No. W–543.

39. The Commission thereafter requested plaintiff to furnish additional data and all data so requested were furnished. Subsequently investigators from the Commission's staff called at plaintiff's New York office, requested the records upon which the data so furnished were based, and examined the same and were furnished and examined such other records as they requested. The Commission's investigators also requested and were furnished additional information and copies of documents, particularly documents bearing upon the issue of public interest with respect to plaintiff's operation between New York and Texas City. Pursuant to these requests, plaintiff filed with the Commission all the information asked for by the Commission's representatives, including copies of numerous letters from shippers stressing the importance to them of the transportation service afforded by plaintiff between New York and Texas City and the need for plaintiff's operation as a common carrier of commodities generally.

40. Before the Commission issued its report and order and the certificate prayed for, plaintiff's vessels were requisitioned by the United States for war purposes and the operation of plaintiff's service between New York and Texas City was thus interrupted by causes over which plaintiff had no control, as the Commission thereafter found in its report, Exhibit D.

41. No competing carrier nor any other party recorded any objection to the issuance to plaintiff of a certificate in the form applied for by it in its application.

42. On or about July 2, 1942, the Commission by Division 4, having fully and thoroughly investigated plaintiff's said application as it was required by law to do, and particularly whether the operation for which plaintiff sought authority, namely, to engage in transportation as a common carrier by water of commodities generally between the ports of New York and Texas City, was or would be required by the present and future public convenience and necessity and whether plaintiff was fit, willing and ready to perform the same, and having carefully considered the plaintiff's operation, the supporting documents and the proof referred to in connection therewith and the matters developed by its investigators, issued its report herein, dated July 2, 1942, Exhibit D, and pursuant thereto issued and served upon plaintiff its order of the same date, Exhibit C, whereby it certified and ordered in part, as follows:

"It is hereby certified, That public convenience and necessity require the continuance of operations by Seatrain Lines, Inc., as a common carrier by self-propelled vessels, in interstate or foreign commerce, in the transportation of commodities generally between the ports of New York, N. Y., New Orleans, La., and Texas City, Tex., by way of the Atlantic Ocean and the Gulf of Mexico.

"It is ordered, That said carrier be, and it is hereby, authorized to perform the service specified above, subject, however, to such terms, conditions, and limitations as are now, or may hereafter be, attached to the exercise of such authority by this Commission."

43. No protest against or objection to said findings and order was made by any common carrier competitor of plaintiff or by any other party and no request for reconsideration or modification was filed. Accordingly, the order and the certificate embodied therein, authorizing plaintiff "to perform the service" of "a common carrier by self-propelled vessels, in interstate or foreign commerce, in the transportation of commodities generally between the ports of New York, N. Y., * * * and Texas City, Tex.," took effect as provided therein on August 10, 1942 and said certificate has been in effect continuously since that time and has been and now is held by plaintiff and is now in effect in accordance with its terms.

44. Pursuant to said certificate and order and in fulfillment of the conditions therein provided, plaintiff has accepted the same and has exercised the authority specified therein, except as prevented by circumstances beyond its control, namely, the requisitioning and diversion of its vessels to war purposes.

45. Acting in reliance upon said certificate authorizing plaintiff to engage in transportation for the general public as a common carrier by water of commodities generally between New York and Texas City, issued to it by the Commission's order of July 2, 1942 and pursuant to the conditions therein contained for the holding of said certificate, plaintiff, among other things, has at great expense maintained its organization, including its office and operating staffs; has maintained its terminals; has published and republished its tariff schedules; has maintained its membership in freight bureaus and tariff publishing agencies; has prosecuted or defended various proceedings affecting its rates and charges, the through movement of freight via its lines, the interchange of railroad cars and other matters essential to the performance of its service; has maintained its stock ownership in the Hoboken Manufacturers Railroad Company; has incurred great expense in arranging for a new and larger site for its terminal facilities in New York Harbor, all of which it has done in reliance upon the certificate and the terms thereof, as embodied in the Commission's said order of July 2, 1942, authorizing plaintiff to engage in transportation for the general public as a common carrier by water of commodities generally between New York and Texas City.

46. Further in reliance upon the terms of the certificate embodied in the Commission's said order of July 2, 1942, plaintiff entered into an agreement with the Administrator of the War Shipping Administration, who had on October 6, 1942 requisitioned title to all of plaintiff's vessels, including all spare parts appurtenant thereto, whereby plaintiff consented to the determination by the Administrator that the use rather than the title of said
16 vessels, their spare parts and appurtenances should be deemed to have been requisitioned as of October 6, 1942 (Federal Register, April 28, 1943, p. 5572). By said agreement plaintiff consented to and did reacquire title to its said vessels. Plaintiff would not have entered into this agreement nor have reacquired its said vessels on the terms provided for therein except in reliance upon the certificate issued by the Commission, as embodied in its order of July 2, 1942, authorizing plaintiff to engage in operation between the ports of New York and Texas City in the transportation of commodities generally without restriction. The Commission was informed of the foregoing facts by letter and by the affidavit filed with it, Exhibit L, attached hereto.

47. Thereafter, in connection with the Commission's order of July 2, 1942, Exhibit C, and the certificate embodied therein, in so far as they authorized plaintiff's operation between New York and Texas City, there occurred the happenings and proceedings which have been previously described in paragraphs 23 to 32, inclusive, with regard to the order and certificate relating to plaintiff's operation between New York and New Orleans.

48. With regard to plaintiff's operation between New York and Texas City, the Commission's said order of February 6, 1945, Exhibit A, which would cancel the certificate embodied in the Commission's order of July 2, 1942, Exhibit C, and revoke the authorization and privileges thereby granted and would issue to plaintiff in lieu thereof a new certificate purporting to limit plaintiff to the use of particular facilities on board its vessels for the transportation of freight, to specify the particular parties from whom plaintiff may receive and to whom it may deliver such freight, and the particular facilities to be used in and the particular method of interchanging such freight with such parties, even if the Commission had jurisdiction so to define or restrict the authorization and privileges granted to a common carrier by water by a certificate (which plaintiff denies), is invalid, null and void and should be annulled and set aside and its enforcement should be enjoined for the reason that since plaintiff duly applied to the Commission on the form prescribed by it, in accordance with its rules, regulations and practices, for the issuance to it of a certificate authorizing it to engage in the transportation of commodities generally and sought a finding under Section 309 that the public convenience and necessity required the proposed operation so described, since the Commission, after investigation, by its said order of July 2, 1942, Exhibit C, made such a finding and pursuant thereto issued a certificate to plaintiff authorizing it to engage in transportation as a common carrier of commodities generally, since such certificate by its terms became effective, and since plaintiff accepted the same and acted and incurred expense and obligations in reliance thereon and on the rights and privileges granted thereby, the Commission is without power thereafter to cancel said certificate embodied in the order of July 2, 1942 or revoke the authorization and privileges thereby granted.

WITH REGARD TO PLAINTIFF'S OPERATIONS BOTH BETWEEN NEW YORK AND NEW ORLEANS AND BETWEEN NEW YORK AND TEXAS CITY

49. The Commission's order of February 6, 1945, Exhibit A, is based upon findings and statements in its report of the same date, Exhibit B, which are erroneous, contrary to and without support in the record, capricious, arbitrary and contradictory.

50. The Commission's order of July 2, 1942 and the certificates embodied therein when they became effective according to their terms and were accepted by plaintiff and when plaintiff thereafter acted in reliance thereon and incurred substantial expense and obligations in reliance thereon, constituted contracts between plaintiff and the United States and vested in plaintiff property rights alalogous to franchises of which plaintiff could not thereafter lawfully be deprived without just compensation and without due process of law. The Commission's order of February
17 6, 1945, which would cancel the certificates embodied in the order of July 2, 1942 and revoke the authorization and privileges granted thereby and, without plaintiff's consent, would substitute therefor different and more restricted rights and privileges, would, if permitted to become effective and enforced, deprive plaintiff of property and take its property for public use without just compensation and without due process of law, in violation of the Fifth Amendment to the Constitution of the United States.

51. Unless the said order of the Commission of February 6, 1945, Exhibit A, be set aside and annulled and its enforcement enjoined, plaintiff will suffer continuing and irreparable injury for which it is and will be without any adequate remedy at law.

Wherefore, plaintiff prays:

First.—That pursuant to the Urgent Deficiencies Act (38 Stat. 220) as reenacted (Section 47, Title 28 U. S. C. A.), a Court of three Judges, one of whom shall be a Circuit Judge, shall be convened to hear this case.

Second.—That process may issue against the defendant, United States of America.

Third.—That after not less than three days' notice to the Interstate Commerce Commission and to the Attorney General of the United States, as provided by law, a hearing shall be held and a temporary stay shall be issued staying and suspending the order of the Interstate Commerce Commission dated February 6, 1945 in its proceeding Docket No. W-543 pending hearing and determination of plaintiff's application for interlocutory and permanent injunctions but not exceeding sixty days.

Fourth.—That after not less than five days' notice to the Interstate Commerce Commission and to the Attorney General of the United States, as provided by law, a hearing shall be held and interlocutory injunction be issued staying and suspending said order of the Interstate Commerce Commission.

Fifth.—That on final hearing of this case a decree be entered herein enjoining, setting aside and annulling the said order of the Interstate Commerce Commission and permanently enjoining the enforcement, execution and operation thereof.

Sixth.—That plaintiff may have such other and further relief as may be proper in the premises.

Respectfully submitted.

CALEB R. LAYTON, 3rd,
Attorney for Plaintiff,
Continental American Building,
Wilmington 99, Delaware.

PARKER MCCOLLESTER,
25 Broadway, New York 4, N. Y.
WILBUR LAROE, Jr.,
Investment Building, Washington 5, D. C.
Of Counsel.

[*Duly sworn to by E. K. Morse; jurat omitted in printing.*]

18 *Exhibit A*

CORRECTED CERTIFICATE AND ORDER

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 6th day of February, A. D. 1945

No. W-543

SEATRAIN LINES, INC., COMMON CARRIER APPLICATIONS

Further consideration having been had of the record in this proceeding, a hearing having been held, and the Commission on the date hereof having made and filed a report on reconsideration containing its findings of fact and conclusions thereon, which report, together with the prior report of July 2, 1942, is hereby referred to and made a part hereof;

It is hereby certified, That public convenience and necessity require the continuance of operation by Seatrain Lines, Inc., as a common carrier by self-propelled vessels, in interstate or foreign commerce, in the transportation of liquid cargoes in bulk; of empty railroad cars; and of property loaded in railroad cars received from and delivered to rail carriers and transported without transfer from railroad cars between the ports of New York, N. Y., New Orleans, La., and Texas City, Tex., by way of the Atlantic Ocean and the Gulf of Mexico:

It is ordered, That said carrier be, and it is hereby, authorized to perform the service specified above, subject, however, to such terms, conditions, and limitations as are now, or may hereafter be, attached to the exercise of such authority by this Commission.

It is further ordered, That the holding of this certificate by

said carrier be, and it is hereby, conditioned upon the exercise of the authority specified above, and upon compliance by said carrier with the requirements of the Interstate Commerce Act and the orders, rules, and regulations of the Commission thereunder.

It is further ordered, That the portion of the application seeking authority to transport passengers between New York and New Orleans be, and it is hereby, denied.

And it is further ordered, That the certificate and order issued on July 2, 1942, be, and it is hereby, superseded and cancelled as of the effective date of this corrected certificate and order; and that this corrected certificate and order shall take effect and be in force from and after May 21, 1945.

By the Commission.

[SEAL] W. P. BARTEL, *Secretary.*

19 *Exhibit B*

INTERSTATE COMMERCE COMMISSION

No. W-543

SEATRAIN LINES, INC., COMMON CARRIER APPLICATIONS

Submitted July 21, 1944.—Decided February 6, 1945

Upon hearing and reconsideration, findings in prior report of July 2, 1942, not printed, modified. Seatrain Lines, Inc., found entitled to continue operation as a common carrier, by self-propelled vessels, in interstate or foreign commerce, in the transportation of liquid cargoes in bulk; of empty railroad cars, and of property loaded in railroad cars received from and delivered to rail carriers and transported without transfer, between the ports of New York, N. Y., New Orleans, La., and Texas City, Tex., by way of the Atlantic Ocean and the Gulf of Mexico. Prior certificate and order superseded and cancelled and corrected certificate and order issued.

Parker McCollester for applicant.

Joseph F. Eshelman, George H. Muckley, E. Myron Bull, and Richard H. Specker for other interested parties.

REPORT OF THE COMMISSION ON RECONSIDERATION

PORTER, Commissioner:

The parties to this proceeding have been heard in oral argument.

In its prior report of July 2, 1942, not printed, division 4 found (1) that applicant was in bona fide operation on January 1, 1940, as a common carrier by self-propelled vessels, in interstate or foreign commerce, in the transportation of commodities

generally between New York, N. Y., and New Orleans, La., by way of the Atlantic Ocean and the Gulf of Mexico and that such operation has been continued since that date, except for an interruption of service over which applicant had no control, and (2) that present and future public convenience and necessity require operation by applicant in like manner between New York and Texas City, Tex., by the same route, and that applicant is fit, willing, and able to continue that operation. Authority to carry passengers between New York and New Orleans was denied. These determinations were made pursuant to the separate applications submitted on May 28, 1941, there being no oral hearing. No objections to the applications were offered. A certificate and order was issued which became effective on August 10, 1942.

Section 309 (a) provides that as to a common carrier by water in bona fide operation on January 1, 1940, over the route or routes or between the ports with respect to which application is made and which has so operated since that time except for interruptions of service over which it had no control, the Commission shall issue a certificate without a showing of public convenience and necessity. Any person not so engaged on January 1, 1940, but who was so engaged on February 1, 1941, the date on which section 309 took effect, is permitted to continue such operation for 120 days thereafter without a certificate and if application is made to the Commission within such period the continuance of the operation shall be lawful pending determination of the application. Public convenience and necessity must be shown. The first sentence of this paragraph applies to the New York-New Orleans operation and the second to the New York-Texas City operation.

In Foss Launch & Tug Co. Applications, 260 I. C. C. 103, division 4 found that "Freight car ferry service is a special kind of transportation not embraced within the term 'transportation of commodities generally' by water." The division reopened
20 No. W-543 for reconsideration, and the attention of applicant therein was called to the fact that the certificate issued probably does not properly describe the operations of Seatrain Lines, Inc., on and since January 1, 1940. It was suggested that an amended certificate be issued to authorize the specific operations in which "Seatrain" was engaged. Applicant opposed such modification but expressed its readiness to submit proof that it was entitled to authority as contained in the certificate. By its further order of January 27, 1944, division 4 reopened the proceeding for hearing upon the question of whether or not "the said findings and certificate and order of July 2, 1942, should be modified so as to authorize applicant to continue to operate in service in which it was engaged, except for interruptions beyond its control, namely, as a common carrier by the 'Seatrain'

type of vessels in the transportation of liquid cargoes in bulk; of empty railroad cars, and of property loaded in freight cars received from and delivered to rail carriers and transported without transfer from the freight cars between the ports above mentioned."

The proceeding was assigned for hearing. Prior thereto applicant filed a motion to vacate and rescind the said order of January 27, 1944 and to discontinue the proceeding. At the hearing, applicant renewed its motion which was overruled by the presiding Commissioner. Applicant had no evidence to offer prior to our action upon the motion. By order of April 3, 1944, we overruled the motion without prejudice to its renewal at the conclusion of the hearing. The proceeding was then reassigned for hearing. Again applicant had no evidence to offer. It took the position as it did in its motion, that the subject matter under consideration and the issues raised were beyond our jurisdiction, since the certificate had taken effect without objection, and as there was no suggestion of fraud or misrepresentation, the authority granted could not now be limited, restricted, or withdrawn. Applicant again moved that the proceeding be discontinued and the order of reopening vacated. Prior to the last hearing applicant had filed a petition for reconsideration of our order of April 3, 1944. This petition was denied. Our prior ruling will be adhered to.

At the hearing the presiding Commissioner announced that in determining the issues we would consider the facts set forth in the applications, together with other documents submitted in connection therewith and our findings in various proceedings dealing with "Seatrain." Applicant insists that when the report and certificate of July 2, 1942, were issued the Commission was fully apprised as to its operations; that except for certain action taken in reliance upon the certificate issued there are no facts now before the Commission which were not before it when the applications were originally determined, and that the proceeding should be discontinued and the order of reopening vacated. There is no intimation of fraud or misrepresentation but there is a question whether through inadvertence authority was granted to engage in operations differing from those in which applicant was engaged on and since the "grandfather" date or from those instituted during the interim period. In determining this question we will consider the operations in which applicant has engaged during past years as described in our reports and also as set forth in the applications.

Applicant for some time operated a special type of vessel described in Investigation of Seatrain Lines, Inc., 195 I. C. C. 215. It was found to be a common carrier by water engaged in the

transportation of property partly by railroad and partly by water. We there said:

"Seatrain owns three vessels designed to transport by water freight brought to or moved from ports by railroads without transferring the freight from the cars, thereby avoiding delays and expenses incident to ordinary steamship operation * * *.

"Seatrain vessels are approximately 480 feet long, with 63-foot beams. * * *. While the original vessel has tank space
21 for 2,200 tons of liquid cargo, and the new vessels have tank space for 4,000 tons of liquid cargo, each vessel is designed primarily for transportation of cargo only when loaded in railroad cars. Each vessel has four decks, and each deck has four sets of railroad tracks of standard gage, the aggregate length of tracks on each vessel being approximately 1 mile * * *. These vessels can handle cargo in railroad cars only between ports at which special loading facilities have been provided. Such facilities have been provided at only three ports, namely, Hoboken, New Orleans, and Havana.

"The loading facilities consist of a combination elevator and crane, the elevator shaft being erected on the dock, and the stationary arms of the crane extending from the frame of the elevator shaft out over the slip. The floor of the elevator is a movable platform called a cradle on which is laid a single track of standard gage. The cradle, when in place on the dock, forms a section of the railroad track over which cars are moved to and from the cradle * * *.

"In loading a Seatrain vessel a car is moved by locomotive over the railroad tracks * * * and stopped on the section of track laid on the cradle where it is blocked and secured. The four corners of the cradle are connected to bails which in turn are attached to an overhead crane. The crane through the bails and cradle lifts the car vertically until the car and cradle are higher than the bulwark of the vessel. Car and cradle are then moved along the arms of the crane to a position over one of the four hatchways of the vessel and lowered through the hatchway, which forms another elevator shaft, to one of the four decks on which the car is to be stowed * * *. Unloading is the reverse of the process of loading.

"Since October 6, 1932, Seatrain, in addition to carrying traffic in railroad cars between Hoboken and Havana, and New Orleans and Havana, has been engaged in transporting freight in railroad cars between Hoboken and New Orleans via Havana. * * * The traffic handled by Seatrain, with the exception of a relatively small amount of liquid cargo handled in the tanks of the vessels, was handled in freight cars from origin to destination without transfer of lading at the ports, * * *."

In our report on further hearing, 206 I. C. C. 328, we said:

"As stated in the original report, Seatrain, since October 6, 1932, has been operating vessels between Hoboken, N. J., and New Orleans (Belle Chasse), La., via Havana, Cuba, on which freight is transported in railroad cars.

"The Seatrain method of transportation was developed for the purpose of eliminating the expenses, disadvantages, and delays incident to the transfer of lading between railroad freight cars and the holds of vessels. By means of the loading machinery described in the original report, loaded freight cars are lifted from the tracks of the connecting railroad at one port, deposited on the Seatrain vessel, which carries them to the port of destination, lifted from the vessel to the tracks of the connecting railroad, and moved to final destinations without having the contents disturbed in any way. The service performed by Seatrain is generally conceded to be superior to that afforded by steamships of the usual type.

"By using Seatrain service, shippers obtain what is practically equivalent to all-rail service, except for the somewhat longer time in transit, at rates less than the all-rail rates. They are also saved packing and handling expenses necessarily incurred if the movements over the break-bulk water routes. In addition, certain classes of bulk freight which cannot be handled in
22 vessels of the usual type, and which cannot bear the all-rail charges, can be handled by Seatrain, and thus markets opened up for them which theretofore could not be reached."

The superiority and advantages of applicant's operation and services when compared with those of steamships of the ordinary type have always been recognized. In Seatrain Lines, Inc. v. Akron, C. & Y. Ry. Co., 226 I. C. C. 7, in considering the matter of through routes and through rates for transportation in connection with Seatrain, we said:

"Undoubtedly the break-bulk lines could also handle all of the traffic now moving over all of the water routes, but that is not a sufficient reason for depriving Seatrain of an opportunity to participate in the traffic under appropriate rates or for depriving the public of the admittedly superior service afforded by Seatrain."

As to the character and superiority of Seatrain's service see also United States v. Pennsylvania R. R. Co., decided by the Supreme Court on January 29, 1945.

In June and July 1941, two of applicant's vessels were requisitioned by the United States Maritime Commission. Prior thereto applicant owned and operated five vessels. The other three were requisitioned by May 21, 1942. All operations between ports in the United States were discontinued. To determine whether the authority granted is too broad we shall reconsider the facts of record upon which the original findings and certificate were based.

NEW YORK-NEW ORLEANS OPERATION

Applicant transported large quantities of freight in 1939 and 1940. This fell off considerably in 1941 because two of its vessels had been requisitioned.

From October 1932, and continuously thereafter including January 1, 1940, and since, applicant operated a weekly service in the transportation of a variety of commodities by water between the ports mentioned under this heading generally by way of Havana, except for interruptions beyond its control. The vessels operated by applicant were of the special type above described designed primarily for carrying property loaded in railroad cars. They differ materially from the ordinary vessels operated in regular steamship service. The first vessel built for this purpose had a capacity of 95 freight cars. The newer vessels accommodate 100 freight cars. The vessels could operate only between docks located in this country at Hoboken, and Belle Chasse (New Orleans), because special facilities for loading and unloading were required and these were maintained only at those ports.

As proof that it was engaged in operation as a common carrier by water and has been so engaged continuously, applicant refers to our reports in Investigation of Seatrain Lines, Inc., supra; Seatrain Lines, Inc. v. Akron, C. & Y. Ry. Co., 226 I. C. C. 7; 243 I. C. C. 199; Hoboken Mfrs. R. Co. v. Abilene & Southern Ry. Co., 237 I. C. C. 97.

In its schedules of sailings applicant indicated that "carload" traffic was handled only in freight cars loaded on its vessels as the schedules were headed "Carloads—(non-break-bulk service)." As to "less carloads" a notation was carried reading "(domestic railroad packing)". In other words, the same packing requirements had to be met as applied in connection with railroad shipments. Applicant lays stress on our prior reports relating to Seatrain. They do not show that applicant at any time handled freight in any manner other than in railroad cars loaded on its vessels with the exception of a small amount of liquid cargo handled in the tanks of the vessels with which they are especially equipped. In Investigation of Seatrain Lines, Inc., 195 I. C. C. 215, 225, we said:

"The Hoboken (Hoboken Manufacturers Railway Company) places less-than-carload freight for Seatrain in cars which are moved to the vessels for loading."

It is clear, so far as this record shows, that the commodities transported by applicant were loaded in railroad
23 cars and handled between New York and New Orleans in non-break-bulk service by means of the special type of equipment operated by it.

To further support its contention that it is a common carrier applicant refers to the fact that it has published and maintained tariff schedules naming a full line of class and commodity rates applicable to the transportation "described" and by such schedules has held itself out to the general public to accept and transport freight of all kinds in accordance with the rules, regulations and rates provided therein. The mere fact that it participates in such tariffs does not establish that it handled freight by means other than in railroad cars. The contrary in indicated. In Seatrain Lines, Inc. v. Akron, C. & Y. Ry. Co., 226 I. C. C. 7, 18, we said:

"In addition, Seatrain is and has been for several years a party to numerous agency tariffs which contain a full line of joint class and numerous joint commodity ocean-rail rates between points in the Southwest and points in New England, * * *. These joint rates, which were currently in effect in connection with break-bulk lines, were made applicable in connection with Seatrain by adding the Seatrain route to the tariffs."

There is no question but that applicant was in bona fide operation by self-propelled vessels, in interstate or foreign commerce, in the transportation of liquid cargoes in bulk, and of commodities generally when loaded in railroad cars received from and delivered to rail carriers and transported without transfer from the cars between the ports of New York and New Orleans by way of the Atlantic Ocean and the Gulf of Mexico, over specified routes by reason of having been engaged in such operation on January 1, 1940, and continuously since, except for an interruption in service beyond its control. The discussion and statement of facts in the prior report of the division are to the same effect. The ultimate findings of the division, however, were that the applicant was engaged in the transportation of commodities generally, but no reference was made therein to the fact that such property was loaded in railroad cars received from and delivered to rail carriers and transported without transfer from the cars between the ports. The certificate issued by the division followed the language of the ultimate findings. Through inadvertence, therefore, the certificate issued did not correctly describe the operations in which applicant, according to the record, was engaged on and since the "grandfather" date. The purpose of the "grandfather" clause is to assure those to whom Congress extended its benefits a "substantial parity between future operations and prior bona fide operations." Alton R. Co. v. United States, 315 U. S. 15. The language used in the ultimate findings of division 4 and the certificate issued is susceptible to a construction that appears to grant applicant authority broader in scope than its prior bona fide operations warrant.

NEW YORK-TEXAS CITY OPERATION

In 1940 applicant acquired two additional vessels of the type heretofore described for use in operations between New York and Texas City. This application is one to continue operations instituted between January 1, 1940, and February 1, 1941, the so-called interim period. The vessels operated on regular schedules, occasionally via Havana, either fortnightly or weekly, until requisitioned. This service, which Seatrain's facilities and type of vessels made possible and the transportation economies resulting from its method of operation, was in all respects similar to that between New York and New Orleans. In Investigation of Seatrain Lines, Inc., 206 I. C. C. 328, under the provisions of section 5 (19–21) of the act we found that the service of applicant between Hoboken and New Orleans (Belle Chasse) "is being operated in the public interest and is of advantage to the convenience and commerce of the people and that extension of the time within which such service may continue will neither exclude, pre-
24 vent nor require competition on the route by water under consideration."

Many interests supported the application and outlined the need for applicant's service. North-bound it was stated that it would be convenient for handling scrap iron in open top cars, carbon black, paper and lumber in boxcars, and of immediate benefit to the potash and sulphur industries whose commodities are handled in bulk, in boxcars. South-bound the advantages were said to be well known. From January to March, inclusive, 1941, 2,361 loaded cars were handled, an average of 91 per voyage, and also 12,782 tons of diesel fuel oil in the special tanks of the vessels. Applicant's net income during thie period increased approximately $174,000 over the same period of the previous year, which was attributed largely to the Texas City operation.

In its report herein division 4 again pointed out the advantages of transportation by the "Seatrain" type of vessel. It said:

"The advantage of transportation by "seatrain" lies principally in the fact that, when compared with other carriers by water, it offers an expedited service to shippers in carload lots. Loading and unloading machinery enables a vessel to be completely unloaded and reloaded at a port within 21 hours. * * * Service to inland points is facilitated by reason of the fact that, instead of the expenses and delays which are ordinarily incident to the transfer of lading between vessels and freight cars, upon being unloaded from applicant's vessels the loaded freight cars can immediately proceed to inland destinations. * * *

"In view of the advantages of applicant's method of operation, and the fact that this operation has been used to the limit of appli-

cant's capacity since institution of the service, we are of the opinion it has been clearly shown that it is fit, willing, and able to continue the operation, and that the present and future public convenience and necessity require its continuance."

The record amply supports the conclusion that the methods of operation between New York and Texas City were similar to those from New York to New Orleans, and that public convenience and necessity require operation between New York and Texas City. Through inadvertence the certificate issued by division 4 did not describe properly the operations between New York and Texas City in which applicant was justly entitled to engage. As construed by applicant the authority granted is broader than warranted or intended.

When it became apparent that the certificate issued might be construed as permitting applicant to engage in operations differing substantially from those in which it had been engaged on the "grandfather" date and which were instituted thereafter, division 4 reopened the proceeding for reconsideration and hearing. The record shows that in the transportation of commodities generally by self-propelled vessels all traffic, other than liquid cargoes in bulk and empty railroad cars, handled by applicant, has been transported in railroad cars received from or delivered to rail carriers. Much emphasis was placed by applicant in the several proceedings before us upon the peculiar advantages of the through transportation made possible by its special type of vessel and operations. Applicant according to this record limited itself to that class of operations. The authority granted clearly and specifically should cover the operations in which applicant was engaged on the "grandfather" date or those instituted during the interim period. This is essential to preserve its position in the national transportation system. See United States v. Carolina Freight Carriers Corp., 315 U. S. 475. Crescent Express Lines, Inc. v. United States, 320 U. S. 401, and cases cited therein.

QUESTIONS OF LAW

Applicant insists that as the certificate and order took effect without objection and there is no suggestion of fraud, misrepresentation, or the withholding of any facts in connection with the applications or the issuance of the certificate, the authority granted may not now, without the carrier's consent, when the power is not expressly stated or no specific reservation is contained in the certificate to revoke or modify it, be limited, restricted or withdrawn.

Section 315 of part III provides in part as follows:

"(c) The Commission may suspend, modify, or set aside its

orders under this part upon such notice and in such manner as it shall deem proper.

"(d) Except as otherwise provided in this part, all orders of the Commission, other than orders for the payment of money, shall take effect within such reasonable time, not less than thirty days, as the Commission may prescribe and shall continue in force until its further order, or for a specified period of time, according as shall be prescribed in the order, unless the same shall be suspended, modified, or set aside by the Commission, or be suspended or set aside by a court of competent jurisdiction."

The foregoing provisions are similar to those contained in sections 15 (2) and 16 (6) of part I. The courts have consistently treated certificates of public convenience and necessity as orders. See State of Colorado v. United States, 271 U. S. 153; Transit Comm. v. United States, 289 U. S. 121; Moffat Tunnel League v. United States, 289 U. S. 113; Pittsburgh & W. V. Ry. Co. v. United States, 281 U. S. 479; Claiborne-Annapolis Ferry Co. v. United States, 285 U. S. 382. The certificate and order issued is an order within the meaning of section 315. Any decision made or order entered may be reopened at any time. Douglas & Co. v. Chicago, R. I. & P. Ry. Co., 21 I. C. C. 541. Creomulsion Co., Inc. v. Southern Ry. Co., 185 I. C. C. 724. The Commission has complete control over its orders. It can at any time recall or amend its orders, and ought to do so whenever error appears. Loftus v. Pullman Co., 19 I. C. C. 102. Traugott Schmidt & Sons v. Michigan Central R. Co., 23 I. C. C. 684. This right seems also to have been recognized by the Supreme Court in Baldwin v. Milling Co., 307 U. S. 478, although action in conformity with our order had been taken. We had entered an order directing the payment of reparation to a shipper. One of the defendants had paid the amounts so directed. Subsequently we reopened the proceedings and found the rates previously condemned not unreasonable and set aside our findings and orders including that on which reparation had been paid. The carrier then endeavored to secure refund to it of the amounts paid. The court in sustaining our action held that the carrier could maintain a suit to recover from the shipper.

The certificate provided that it was subject "to such terms, conditions, and limitations as are now, or may hereafter be, attached to the exercise of such authority by this commission." Section 309 (d) provides as follows:

"Such certificate shall specify the route or routes over which, or the ports to and from which, such carrier is authorized to operate, and, at the time of issuance and from time to time thereafter, there shall be attached to the exercise of the privileges granted by such certificate such reasonable terms, conditions, and limitations, as the public convenience and necessity may from time

to time require, including terms, conditions, and limitations as to the extension of the route or routes of the carrier, and such other terms, and conditions, and limitations as are necessary to carry out, with respect to the operations of the carrier, the requirements of this part or those established by the Commission pursuant thereto: Provided, however, That no terms, conditions, or limitations shall restrict the right of the carrier to add to its equipment, facilities, or service within the scope of such certificate, as the development of the business and the demands of the public shall require, or the right of the carrier to extend its services over uncompleted portions of waterway projects now or hereafter authorized by Congress, over the completed portions of which it already operates, as soon as such uncompleted portions are open for navigation."

26 In view of the foregoing provisions of law and the language contained in the certificate, it must necessarily be assumed that applicant was on notice that the terms, conditions, and limitations of the certificate might be changed if justification therefor appeared. Louisville & N. R. Co. v. Mottley, 219 U. S. 467. If the Commission is without power to modify a certificate except where obtained by fraud or misrepresentation, then the proviso to the above section which prohibits the imposition, by such terms, conditions, or limitations, of restrictions upon the right of the carrier to add to its equipment, facilities, or service within the scope of the certificate as the development of the business and the demands of the public shall require, etc., would be meaningless.

Applicant insists that the question of our power to withdraw, rescind or change adversely to the carrier the scope and nature of operating rights granted by an effective certificate was thoroughly considered, and decided in the negative, in Smith Bros. Revocation of Certificate, 33 M. C. C. 465, which involved the provisions of sections 208 (a) and 212 (a) of part II of the act. Section 208 (a), which contains provisions somewhat similar to those contained in section 309 (d) as to the attachment of reasonable terms, and limitations, provides in part as follows:

"Any certificate issued under section 206 or 207 shall specify the service to be rendered and the routes over which, the fixed termini, if any, between which, and the intermediate and off-route points, if any, at which, and in case of operations not over specified routes or between fixed termini, the territory within which, the motor carrier is authorized to operate; and there shall, at the time of issuance and from time to time thereafter, be attached to the exercise of the privileges granted by the certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require, including

terms, conditions, and limitations as to the extension of the route or routes of the carrier, and such terms and conditions as are necessary to carry out, with respect to the operations of the carrier, the requirements established by the Commission under section 204 (a) (1) and (6): * * *"

We there said it was questionable whether it was intended that we should regulate service through "terms, conditions, and limitations" inasmuch as we were given authority in section 204 (a) (1) to "establish reasonable requirements with respect to continuous and adequate service." Even such broad power was held inadequate to permit what in effect was a modification of a separate provision of the act. We therefore considered whether Congress intended by the words quoted to give us authority to include self-executing forfeiture provisions in certificates in view of the provisions contained in section 212 (a) which provides in part as follows:

"Certificates * * shall be effective from the date specified therein, and shall remain in effect until suspended or terminated as herein provided. Any such certificate * * * may, upon application of the holder thereof, in the discretion of the Commission, be amended or revoked, in whole or in part, or may upon complaint, or on the Commission's own initiative, after notice and hearing, be suspended, changed, or revoked, in whole or in part, for willful failure to comply with any provision of this part or with any lawful order, rule, or regulation of the Commission promulgated thereunder, or with any term, condition, or limitation of such certificate * * *; Provided, however, That no such certificate, * * * shall be revoked (except upon application of the holder) unless the holder thereof willfully fails to comply, within a reasonable time, not less than thirty days, to be fixed by the Commission, with a lawful order of the Commission, made as provided in section 204 (c), commanding obedience to the provision of this part, or to the rule or regulation of
27 the Commission thereunder, or to the term, condition, or limitation of such certificate * * * found by the Commission to have been violated by such holder * * *."

In Smith Bros. Revocation of Certificate, supra, we further said:

"In our opinion, the language of the foregoing section is clear and definite and unmistakably shows that Congress intended that a certificate, once effective, may be terminated by us only on the conditions, and according to the procedure, therein specifically provided. We may issue decision upon decision, and order upon order, on an application for a certificate so long as sufficient reason therefor appears and until all controversy is determined, but once

a certificate, duly and regularly issued, becomes effective, our authority to terminate it is expressly marked off and limited."

We concluded that irrespective of the self-executing forfeiture term or condition in respondents' certificate, it continued in full force and effect unless and until terminated in accordance with the provisions in section 212 (a). In our supplemental report in the proceeding, 42 M. C. C. 211, we said:

"In expressing the views stated * * * we do not desire to be understood as holding that a certificate obtained by fraud or misrepresentation, or inadvertently issued by this Commission, may not be changed or revoked without proceeding under Section 212 (a). Here there is no question of fraud, misrepresentation, or inadvertence."

Part III of the act contains no specific provisions such as those contained in section 212 (a), and applicant claims that certificates issued thereunder are not subject to revocation or amendment. However, the "Commission may suspend, modify, or set aside its order." We are of opinion that we have ample power to correct a certificate, in the public interest, as we may find appropriate, when through inadvertence greater authority was granted than the facts warrant. If the Commission does not have authority to correct an error made through inadvertence, the error, as in this proceeding, might well have the effect of enlarging the jurisdiction conferred by the statute. The mere statement of such a proposition is to refute it. We have in a number of cases in considering the question of minimum rates indicated that our power to prescribe such rates should be exercised sparingly. Petroleum and Petroleum Products, Calif. to Ariz., 241 I. C. C. 21. A like attitude should be taken in cases of the character here considered. Our power to correct a certificate should be used so as to avoid, as far as practicable, adversely affecting vested rights. At the same time the stability of the industry should be assured by not granting operating authority greater than that to which an applicant is entitled.

In Crescent Express Lines, Inc. v. United States, supra, applicant was authorized to continue to operate as a common carrier by motor vehicle of not more than 6 passengers, not including the driver and not including children under 10 years of age who did not occupy a seat. Applicant in that proceeding argued that it would be engaged in the same business if, in lieu of using seven-passenger sedans, it hauled larger numbers of passengers in buses. The Supreme Court, however, said:

"The line between six-passenger and larger scale operation must be drawn somewhere, and the Commission has fixed it where the appellant conducted its business on June 1, 1935. (The "grand-

father" date) * * * To authorize the appellant to change to the business of carrying passengers by bus would alter the position in the transportation system it occupied on July 1, 1935. Noble v. United States, 319 U. S. 88. * * *

"When the Commission requires the applicant under the grandfather clause to limit its future operations to the type of equipment and service previously offered, it acts within its power
28 and in accord with the purposes of Congress to maintain motor transportation facilities appropriate to the needs of the public. * * *

In Manhattan Coach Lines, Inc. v. Adirondack Transit Lines, 42 M. C. C. 123, division 5 considered a complaint alleging that defendant was operating in violation of the terms of its certificate in that it was using certain streets and highways not specifically authorized. The division held that the principle announced in Smith Bros. Revocation of Certificate, supra, was controlling where changes amounting to partial revocation are sought. It said:

"A decision having been reached in the proceeding on defendant's 'grandfather' clause application, and a certificate having been issued and allowed to become final and effective without exception by interested persons, is conclusive, in the absence of fraud, misrepresentation, *or mechanical error* * * *, as against belated claims of competitors that too much was granted. * * * *Consistently with its past operation, defendant is now authorized to transport passengers between the termini of described routes and 'to and from' 'all intermediate points.'*" [Italics ours.]

On reconsideration, 43 M. C. C. 477, the Commission construed the terms used in defendant's certificate. It was not concerned with the question of revoking or changing such certificate. Its findings were upheld by a three-judge court in the Southern District of New York on October 16, 1944.

Applicant asserts that pursuant to, and in reliance upon, the certificate it made plans to reenter the coastwise trade and has incurred substantial expense and made important commitments for the future which would not have been made if it had reason to believe that the Commission would revoke, limit, or alter the certificate, and that now to deprive it of any rights granted would be taking property without due process of law. It contends that the certificate is in the nature of a franchise; that it is not revocable at the will of the grantor but a property right which may be altered or revoked only in accordance with its terms; that it has reacquired title to 4 vessels previously owned which title had been requisitioned by the Government; that it has continued to publish and supplement tariff schedules which do not limit its undertak-

ing to handle freight in cars or the receipt and delivery thereof only from and to railroads; that it concurs in tariffs of other carriers which do not contain such limitations and has also continued to maintain freight stations for the direct receipt and delivery of freight. These are the matters urged at the hearing, on brief and on oral argument, in support of its claim that it made expenditures and commitments which otherwise would not have been made. As stated, the proceeding was twice set for hearing. Notwithstanding this, applicant, and counsel who made these contentions in its behalf, failed to offer any evidence. The record therefore contains no specific showing in that respect. For a vested right to attach and for a franchise to become irrevocable it must have been performed to a substantial degree. N. Y. Electric Lines v. Empire City Subway, 235 U. S. 179. Applicant has not operated under the certificate issued because its vessels were requisitioned. Nothing is shown of record respecting future plans for the movement of traffic. It is not apparent that the vessels above mentioned would not have been reacquired for use in services such as those in which applicant was engaged on and since the "grandfather" date. However that may be, we are limited by the evidence of record and the certificate must conform thereto. It may be again observed that, in any event, all certificates are granted subject to section 309 (d). No action of the holder of a certificate, therefore, can serve to inhibit the power of the Commission to attach to such certificate reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require.

Applicant further contends that we have no authority to restrict a water carrier to the use of a particular type or size of vessel or to the handling of cargo in any particular manner nor to the use of any particular devices or equipment. The question here is whether the authority granted covers the operations in which applicant was engaged on the "grandfather" date or which were instituted during the interim period. Under the "grandfather" provisions of section 309 a certificate shall be issued without proof of public convenience and necessity to cover operations in which an applicant was engaged on and since January 1, 1940, and as respects an interim application, a certificate shall be issued covering the operations embraced within the application if it is found, among other things, that the proposed service will be required by the present or future public convenience and necessity.

29

In the instant proceeding it is clear from the record that applicant was engaged in the transportation of property loaded in railroad cars of empty railroad cars, and of liquid cargoes in bulk. Applicant requested authority to engage in these operations

between the ports covered by its applications. The certificate may be construed to authorize applicant to engage in operations differing from those in which it was engaged on the "grandfather" date and since, and during the interim period which were described as being similar to those performed during the "grandfather" period. Seatrain's operation is anomalous in that it requires the use of railroad freight cars. Hoboken Mfrs. R. Co. v. Abilene & S. Ry. Co., 248 I. C. C. 109.

Whenever it appears that an order is erroneous it should be corrected. Loftus v. Pullman Co., supra. Traugott Schmidt & Sons v. Michigan Central R. Co., supra. Such a situation is here presented. We have authority to make the modification. See also Levisa River R. Co. Construction, 257 I. C. C. 203, decided by division 4 on May 4, 1944, in which a petition for reopening was denied.

Upon reconsideration and hearing we find that the following facts among others have been established:

1. Applicant was engaged on and since January 1, 1940, except for interruptions beyond its control, in the operation of self-propelled vessels designed for the transportation of (1) property when loaded in railroad cars, (2) empty railroad cars, and (3) liquid cargoes in bulk.

2. Applicant's vessels have all been taken over by the United States Maritime Commission and applicant is not now in operation and had not operated for several months prior to the date on which the certificate was issued by division 4.

3. Applicant was engaged on January 1, 1940, and continuously since, except for interruptions beyond its control, in the transportation by water, by self-propelled vessels, in interstate or foreign commerce, of liquid cargoes in bulk; of empty railroad cars, and of property loaded in railroad cars received from and delivered to rail carriers and transported without transfer from railroad cars, between the ports of New York and New Orleans by way of the Atlantic Ocean and the Gulf of Mexico.

4. Applicant is fit, willing, and able to continue operations instituted after January 1, 1940, between New York and Texas City, in the transportation by water, by self-propelled vessels, in interstate or foreign commerce, of liquid cargoes in bulk, of empty railroad cars, and of property loaded in railroad cars received from and delivered to rail carriers and transported without transfer from railroad cars, which operations are required by public convenience and necessity.

5. Applicant seasonably filed applications for authority to continue the operations described in paragraphs 3 and 4.

6. Applicant has not engaged in transportation of property in so-called "break-bulk" service, but has confined its operations

exclusively to transportation of property loaded in railroad cars, of empty railroad cars, and of liquid cargoes in bulk in special tanks.

7. Applicant's operations, because of the special type and nature, have been reorganized as superior to, and differing from, those performed by the break-bulk lines.

8. The certificate now in effect by inadvertence erroneously describes the operations in which applicant was engaged on and since the "grandfather" date and during the interim period.

CONCLUSIONS

Upon hearing and reconsideration, we conclude that Seatrain Lines, Inc., is entitled to a certificate authorizing it to continue operations as a common carrier by water, by self-propelled vessels, in interstate or foreign commerce, in the transportation of liquid cargoes in bulk; of empty railroad cars, and of property loaded in railroad cars received from and delivered to rail carriers, and transported without transfer from the railroad cars, between the ports of New York, New Orleans, and Texas City by way of the Atlantic Ocean and the Gulf of Mexico; subject, however, to general conditions which are necessary to carry out, with respect to the continuance of applicant's operations, the requirements of part III of the act and the orders, rules, and regulations of the Commission thereunder. In other respects the findings and conclusions of the prior report are affirmed.

The certificate and order heretofore entered in this proceeding will be superseded and cancelled, and a corrected certificate and order will be issued to conform to the record, and our findings herein.

SPLAWN, Commissioner, concurring:

I concur in the theory of this report; that is, that the Commission may correct a certificate which has been issued inadvertently.

The report of division 4 makes clear that the operations of this applicant during the statutory period were by inadvertence erroneously described in the original certificate issued by the division. This error, due entirely to oversight or heedlessness, the division sought to correct. It is my understanding there was no change in the judgment of the division but merely a discovery of an inadvertent mistake. Inquiry was made of the applicant as to whether or not its practices during the statutory period were a different from those described in this report. There was every effort to ascertain whether any interest had become vested by reason of the certificate inadvertently issued. Under these circumstances, I believe the Commission may correct the certificate

so as to conform to the actual operations of the applicant. Such a correction would also meet the test of sparing use of the Commission's power in this respect.

I do not agree with the implication of the report that the Commission may at any time for any cause change an outstanding certificate.

LEE, Commissioner, dissenting:

In my opinion, the orders of December 18, 1943, and January 27, 1944, reopening this proceeding should be vacated for the following reasons:

(1) The transportation of property loaded in railroad cars, and of empty railroad cars, is embraced within the term "transportation of commodities generally," as that term was used in the certificate of public convenience and necessity issued to applicant on July 2, 1942.

(2) The certificate issued to applicant on July 2, 1942, was not obtained by fraud or misrepresentation and was not inadvertently issued. Under these circumstances, we are without power to change or amend the certificate, or to revoke it in part, without applicant's consent.

(3) It is an abuse of power, on our own motion, to change, or amend, or revoke in part, the certificate issued to applicant on July 2, 1942, after such certificate has been in effect for so long a period of time, assuming that we have such power.

31 (1) By applications filed on May 29, 1941, Seatrain sought certificates of public convenience and necessity authorizing transportation of commodities generally. The certificate issued on July 2, 1942, does not authorize any operation for which authority was not sought by applicant. Any inference to the contrary which might arise from the statements in the second paragraph preceding the formal findings in the report of the majority is, therefore, without foundation in fact.

Seatrain's operations have been the subject of almost continuous investigation by us since 1932. Investigation of Seatrain Lines, Inc., 195 I. C. C. 215, 206 I. C. C. 328; Seatrain Lines, Inc. v. Akron, C. & Y. Ry. Co., 226 I. C. C. 7, 243 I. C. C. 199; Hoboken Mfrs. R. Co. v. Akron, C. & Y. Ry. Co., 234 I. C. C. 114; Hoboken Mfrs. R. Co. v. Abilene & S. Ry. Co., 237 I. C. C. 97, 248 I. C. C. 109; Missouri Pac. R. Co. and T. & P. Ry. Co., Service by Water, 245 I. C. C. 143. In July 1933, in the report first cited above, we found that Seatrain was a common carrier of property by water. In 1935, 1938, 1939, 1940 and 1941, in the other reports cited above, we affirmed that finding. Some members of the Commission, in separate expressions, expressed the opinion that Seatrain's vessels were "car ferries" and that, therefore, Seatrain was a railroad,

but, as indicated, for reasons stated in some detail in the reports, the majority of the Commission did not accept that view.

On July 2, 1942, upon consideration of its applications, which contain references to the cases cited above, and of all evidence of record, division 4, in the prior report herein, found that Seatrain was in bona fide operation on January 1, 1940, as a common carrier by self-propelled vessels, in interstate or foreign commerce, in the transportation of commodities generally between the ports of New York and New Orleans, by way of the Atlantic Ocean and the Gulf of Mexico; that such operation had been continued since that date, except for an interruption of service over which applicant had no control; that the present and future public convenience and necessity required operation by applicant as a common carrier by self-propelled vessels, in interstate or foreign commerce, in the transportation of commodities generally between the ports of New York and Texas City, by way of the same routes; that applicant was fit, willing, and able to continue such operations; and that applicant was entitled to a certificate authorizing such operations. A certificate in conformity with these findings was issued to applicant on July 2, 1942, which, by its terms, became effective on August 10, 1942.

When these findings were made, and the certificate issued pursuant thereto, division 4 obviously was fully informed with respect to Seatrain's operations. It was then the practice of the division, upon appropriate applications therefor, to issue certificates authorizing transportation of commodities generally to common carriers by water which had been transporting a number of commodities on and since January 1, 1940, or which established that public convenience and necessity required such transportation. The usual restriction, imposed as a matter of policy, was to the use of self-propelled or non-self-propelled vessels. Surely it must be found that the division knowingly and deliberately made the findings in the prior report and knowingly and deliberately issued the certificate to Seatrain pursuant thereto, intending that such certificate authorize continuance of the operations in which Seatrain had been engaged.

The division's action in reopening this proceeding more than 18 months after the certificate had been regularly issued was not due to the filing of any request therefor on the part of Seatrain or any of its numerous competitors. On the contrary, the proceeding was reopened by division 4 on its own motion solely because the division changed its mind as to the quantum of authority it should have issued to Seatrain. On December 18, 1943, on reconsideration in Foss Launch & Tug Co. Applications, 260 I. C. C. 103, division 4 amended the certificate issued to the Foss Company on August 26, 1942, which authorized transportation of

commodities generally, by eliminating therefrom authority
32 to transport "freight cars, loaded or empty, in the performance of a freight-car ferry service." To justify this action the division held that the certificate issued to the Foss Company did not include the right to engage in freight-car ferry service. On the same day on which it issued the amended certificate to the Foss Company, the division reopened the instant proceeding for reconsideration and directed our Bureau of Water Carriers and Freight Forwarders to call Seatrain's attention to its action on reconsideration in the Foss case and to suggest that Seatrain's certificate be amended so as to restrict the authorized operations to the transportation of liquid cargoes in bulk, of empty railroad cars, and of property loaded in freight cars received from and delivered to rail carriers without unloading such property from the freight cars. Seatrain opposed such amendment of the certificate. Thereupon, on January 27, 1944, division 4 reopened this proceeding for hearing.

That the action taken on reconsideration in the Foss case was a distinct departure from the practice previously followed by the division, and caused the division to change its mind as to the authority which it should have issued to Seatrain, is shown by the report in Puget Sound Navigation Company Common Carrier Application, not printed, the first report in the Foss case, not printed, and the reports in Marine Oil Transp. Co. Common Carrier Application, 250 I. C. C. 588, and Puget Sound Tug & Barge Company Common Carrier Application, 250 I. C. C. 791, in which the division had clearly indicated that, unless specifically excepted therefrom, authority to transport commodities generally included the right to transport "freight cars, loaded or empty."

In the Puget Sound Navigation Company case, decided April 15, 1942, the applicant sought authority to transport commodities generally by self-propelled vessels between certain points and to transport railroad freight cars by non-self-propelled vessels between certain points. The division merely granted the authority sought, which, as indicated, was for the use of self-propelled vessels for the transportation of commodities generally, and of non-self-propelled vessels for the transportation of railroad freight cars, without any reference to the meaning of the term "transportation of commodities generally."

In the first report in the Foss case the division, one member not participating, on August 26, 1942, a few weeks after the decision in the instant proceeding, found that Foss was on January 1, 1940, and continuously thereafter had been, in bona fide operation as a common carrier of commodities generally by means of non-self-propelled vessels between all points in Washington on Puget Sound and Grays Harbor and issued a certificate authorizing

continuance of such operation. Thereafter, on February 15, 1943, in the Marine Company case the division found that the Marine Company was on January 1, 1940, and continuously thereafter had been, in bona fide operation as a common carrier by water in the performance of freight-car ferry service by non-self-propelled vessels from and to certain points in Washington and issued a certificate authorizing continuance of such operation. One member of the division, who had participated in the decision reached in the first report in the Foss case, dissented on the ground that the Foss Company, which owned and controlled the Marine Company, could conduct the freight-car ferry service under the certificate issued to it on August 26, 1942, and that separate authority should not be issued to the Marine Company. If, at the time of issuance of the certificates to the Foss Company and to Seatrain the division had been of the opinion that transportation of loaded and empty railroad cars was not embraced in the term "transportation of commodities generally" it would seem logical for the division to have so stated in the Marine Company case, thereby removing the reason for the dissent of one of its members.

In the Puget Sound Tug & Barge Company case, decided June 12, 1943, about a year after the certificate was issued to Seatrain, the division found that the Puget Sound Tug & Barge Company was incorporated for the purpose of leasing, managing, and operating the vessels and water-carrier properties and facilities
33 of Drummond Lighterage Co., Cary-Davis Tug & Barge Co., and Pacific Tow Boat Co.; that the agreements by which such properties were leased by the former company did not involve operating rights except in connection with freight-car ferry service between Seattle and certain other points; that the operating rights covering the freight-car ferry service were reserved by Drummond Lighterage Co. and such service was continued in its name; that because the freight-car ferry service was performed under the lease agreement authority to continue such service should be granted to the lessor, Drummond Lighterage Co.; that otherwise the Puget Sound Tug & Barge Company was operating in its own behalf; and that it was entitled to authority to transport "commodities generally, except freight cars, loaded or empty." If, at that time, the division was of the opinion that transportation of commodities generally did not include "freight cars, loaded or empty," there was no occasion for making the exception in its findings. It did not, however, express any such opinion at that time, but, on the contrary, made the exception because, in its opinion, "only one 'grandfather' right is preserved by the single operation which was conducted" and that should be granted to Drummond Lighterage Company.

On December 5, 1944, the Commission affirmed the action taken

by the division, on reconsideration, in the Foss case. I dissented because I felt that we were without power to change, amend, or revoke in part, the certificate issued to the Foss Company on August 26, 1942, without its consent and that, in any event, "transportation of commodities generally" should embrace transportation of all classes of property, including railroad cars, loaded or empty.

It seems appropriate here to point out that Seatrain contends, and the record indicates, that it transported various commodities in port-to-port service, on its own billing, which were not "loaded in railroad cars received from and delivered to rail carriers and transported without transfer from railroad cars," In Hoboken Mfrs. Co. v. Abilene & S. Ry. Co., 248 I. C. C. 109, at page 113, we found that:

"Moreover, the evidence shows that Seatrain does move a very substantial number of empty cars, routing them preferably by Havana in the hope that there they may pick up loads. It is also shown that a large volume of traffic via Seatrain originates or terminates at the ports, and that a supply of cars for traffic so originating is there maintained at Seatrain's expense."

The reports of our investigation of Seatrain disclose that it leased cars from private car companies.

(2) As stated in the report of the majority, there is no intimation of fraud or misrepresentation on the part of applicant. This proceeding was reopened by division 4, on its own motion, for the reasons stated above. In my opinion, we cannot fairly find that the certificate issued to Seatrain on July 2, 1942, and which has been in effect since that time without objection from anyone, was inadvertently issued. On the contrary, it was duly and regularly issued in accord with the findings of the division. Not having been issued through inadvertence, we are without power to change, or amend, or revoke it, in whole or in part, without Seatrain's consent. A certificate is something more than a mere revocable license. It is similar to a franchise. In Frost v. Corporation Commission, 278 U. S. 515, the United States Supreme Court considered an Oklahoma statute which declared that cotton gins are public utilities and that no one may operate a cotton gin without first securing a permit from the State Corporation Commission. In holding that such a permit is a franchise, the court said:

"It follows that the right to operate a gin and to collect tolls therefor, as provided by the Oklahoma Statute, is not a mere license, but a franchise, granted by the State in consideration of the performance of a public service; and as such it constitutes property right within the protection of the Fourteenth Amendment. See Walla Walla v. Walla Walla Water Co., 172

34 U. S. 1, 9; California v. Pacific Railroad Co., 127 U. S. 1, 40–41; Monongahela Navigation Co. v. United States, 148 U. S. 312, 328, 329; Owensboro v. Cumberland Telephone Co., 230 U. S. 58, 64–66; Boise Water Co. v. Boise City, 230 U. S. 84, 90–91; McPhee & McGinnity Co. v. Union Pac. R. Co., 158 Fed. 5, 10–11.

"In California v. Pacific Railroad Co., supra, pp. 40–41, a franchise is defined as 'a right, privilege, or power of public concern, which ought not to be exercised by private individuals at their mere will and pleasure, but should be reserved for public control and administration, either by the government directly, or by public agents, acting under such conditions and regulations as the government may impose in the public interest, and for the public security * * * No private person can establish a public highway, or a public ferry, or railroad, or charge tolls for the use of the same, without authority from the legislature, direct or derived. These are franchises * * * The list might be continued indefinitely.'

"Specifically, the foregoing authorities establish that the right to supply gas or water to a municipality and its inhabitants, the right to carry on the business of a telephone system, to operate a railroad, a street railway, city water works or gas works, to build a bridge, operate a ferry, and to collect tolls therefor, are franchises. And these are but illustrations of a more comprehensive list, from which it is difficult, upon any conceivable ground, to exclude a cotton gin, declared by statute to be a public utility engaged in a public business, the operation of which is precluded without a permit from a State governmental agency, and which is subject to the same authority as that exercised over transportation and transmission companies in respect of rates, charges and regulations. Under these conditions, to engage in the business is not a matter of common right, but a privilege, the exercise of which, except in virtue of a public grant, would be in derogation of the State's power. Such a privilege, by every legitimate test, is a franchise."

In the absence of a fixed term of life, or of an express reservation of the right of revocation, a franchise is perpetual and irrevocable except possibly for nonexercise or nonuser. Owensboro v. Cumberland Telephone Co., 230 U. S. 58, N. Y. Electric Lines v. Empire City Subway, 235 U. S. 179, and cases cited therein.

Paragraphs (a) and (b) of section 309 of part III of the act, which contain the "grandfather" and "interim operation" provisions with respect to common carriers by water and provide specifications with respect to the filing of applications for certificates, are patterned after the like numbered paragraphs of section 206 of part II of the act which relates to carriers by motor vehicle.

Paragraph (c) of section 309 of part III, which specifies the findings which must be made by us before a certificate (other than under the "grandfather" clause) may be issued to a common carrier by water, is similar to paragraph (a), excluding the proviso, of section 207 of part II. Paragraph (d) of section 309 of part III, which provides in part that there shall be attached to the exercise of the privileges granted by a certificate issued to a water carrier such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require, is substantially the same as paragraph (a) of section 208 of part II. In considering our power under section 208 to attach terms, conditions, and limitations to the exercise of the privileges granted by a certificate issued to a common carrier by motor vehicle, and to revoke such a certificate, in Smith Bros. Revocation of Certificate, 33 M. C. C. 465, at pp. 470–472, we said:

"Section 208 (a), which provides for terms and conditions of certificates, reads in part as follows:

"'Any certificate issued under section 206 or 207 shall specify the service to be rendered and the routes over which, the fixed
35 termini, if any, between which, and the intermediate and off-route points, if any, at which, and in case of operations not over specified routes or between fixed termini the territory within which, the motor carrier is authorized to operate; and there shall, at the time of issuance and from time to time thereafter, be attached to the exercise of the privileges granted by such certificate such reasonable *terms*, *conditions*, and *limitations* as the public convenience and necessity may from time to time require, including terms, conditions, and limitations as to the extension of the route or routes of the carrier, and such *terms* and *conditions*, as are necessary to carry out, with respect to the operations of the carrier, the requirements established by the Commission under section 204 (a) (1) and (6) * * *.'" [Italics supplied.]

The power to attach terms, conditions, and limitations granted by the above section is a broad one, but it is questionable whether it was intended that we should regulate service through "terms, conditions, and limitations," in view of the fact that in section 204 (a) (1) we are given the power to "establish reasonable requirements with respect to continuous and adequate service." Assuming but not determining that we can regulate service through "terms, conditions, and limitations," even such a broad power is inadequate to permit what in effect is a modification of a separate provision of the act. The United States Supreme Court has frequently held that the Commission is an agency of limited powers and authority; that, while Congress may delegate to the Commission certain of its own power and authority, the exercise of such delegation does not extend beyond expressed enactment or its

fairly implied inferences, and that important powers should not be read into the act by implication but should be conferred in clear and unmistakable terms. Thompson v. United States, 246 U. S. 547; United States v. Pennsylvania R. Co., 242 U. S. 208; and Interstate Commerce Commission v. Cincinnati, N. O. & T. P. Ry. Co., 167 U. S. 479. We have also found that, in the absence of specific language, only the most unmistakable evidence of the intention to confer upon us the power to act under given circumstances would warrant the assumption of such power through our own construction of the act. Wisconsin R. Comm. v. Chicago & N. W. Ry. Co., 87 I. C. C. 195.

It therefore is first necessary to ascertain whether Congress intended by the words "terms, conditions, or limitation," to empower us to include self-executing forfeiture provisions in certificates in view of the provisions contained in section 212 (a). This section reads in part as follows:

"Certificates * * * shall be effective from the date specified therein, and shall remain in effect until suspended or *terminated as herein provided.* Any such certificate * * * may, upon application of the holder thereof, in the discretion of the Commission, be amended or revoked, in whole or in part, or may upon complaint, or on the Commission's own initiative, after notice and hearing, be suspended, changed, or revoked, in whole or in part, for willful failure to comply with any provision of this part, or with any lawful order, rule, or regulation of the Commission promulgated thereunder, or with any *term, condition,* or *limitation* of such certificate * * *; *Provided however,* That no such certificate, * * * shall be revoked (except upon application of the holder) unless the holder thereof willfully fails to comply, within a reasonable time, not less than thirty days, to be fixed by the Commission, with a lawful order of the Commission, made as provided in section 204 (c), commanding obedience to the provision of this part, or to the rule or regulation of the Commission thereunder, or to the *term, condition,* or *limitation*
36 *of such certificate* * * * found by the Commission to have been violated by such holder * * *." [Italics supplied.]

Terminate is a technical word to describe the end or termination of a period. It is defined by the New Standard Dictionary as: "To put an end or stop to; bring to a completion, finish, to cease to be, come to an end." It will be observed that the above section provides only one method for terminating a certificate, and that is by revoking it.

In our opinion, the language of the foregoing section is clear and definite and unmistakably shows that Congress intended that a certificate, once effective, may be terminated by us only on the

conditions, and according to the procedure, therein specifically provided. We may issue decision upon decision, and order upon order, on an application for a certificate so long as sufficient reason therefor appears and until all controversy is determined, but once a certificate, duly and regularly issued, becomes effective, our authority to terminate it is expressly marked off and limited. All the antecedent decisions and orders are essentially procedural in character, and may be set aside, modified, or vacated, but the certificate marks the end of the proceeding, just as the entry of a final judgment or decree marks the end of a court proceeding. To hold that under section 208 (a) we have the power to include in certificates self executing forfeiture terms, conditions, or limitations would make section 212 (a) merely surplusage and would wipe out the stability and certainty with respect to operating rights of common carriers by motor vehicle required in the public interest and contemplated by the act.

It is clear from the foregoing that the issuance of a certificate to a motor carrier under part II of the act marks the end of the application proceeding and that we are without power to change, amend, or revoke such certificate, except on the conditions and according to the procedure, specified in section 212 (a) of the act. Part III of the act contains no provisions comparable to section 212 (a) of part II, nor any other provisions conferring upon us power to suspend, change, amend, or revoke certificates. We recognized this prior to the final enactment of part III and we called this matter to the attention of Congress. In a report to the Senate Committee on Interstate Commerce and the House Committee on Interstate and Foreign Commerce on January 29, 1940, while S. 2009 in the two forms in which it had been passed was before the conference committee, in referring to the House bill which was later enacted as the Transportation Act of 1940, Commissioner Eastman, in the capacity of chairman of our legislative committee, said:

House bill.—This bill leaves section 212 (a) unchanged, and has no corresponding provision in the new part III. While there is room for argument, we are inclined to believe that provision for the revocation or suspension of water carrier certificates or permits is not essential, if adequate penalty provisions are provided for violations of part III. Revocation or suspension, in the case of motor carriers, is believed to be the most effective means of enforcement, since there are so many such carriers, and the operations of the great majority are so small, that enforcement through penal actions in courts presents many practical difficulties; but this should not be true of water carriers.

Nevertheless, Congress did not include in part III of the act any provisions conferring upon us power to change, amend, or revoke,

in whole or in part, an effective certificate held by a water carrier. It must be assumed that when Congress passed the Transportation Act of 1940 it was fully aware of the decisions holding that our powers are limited to those which are conferred upon us in clear and unmistakable terms, and that if it had been the intention of Congress to empower us to suspend, change, amend, or revoke certificates held by water carriers it would have specifically so provided, as it did in section 212 (a) of part II of the act
37 with respect to motor carriers. The conclusion would seem to be inescapable that it was the purpose of Congress not to confer such power upon us.

Part III of the act is largely patterned after part II. Motor carriers and water carriers are subjected to comprehensive regulation with respect to their properties, their operations, their rates, fares, and charges, their accounts and records, their securities, and, generally speaking, all of their activities relating to their transportation service. About the only right conferred upon them by the act, which we are not authorized to change, or restrict, or set aside, without their consent, is the operating authority issued to them. If we can change or amend an effective certificate, under the circumstances here presented, and on the questionable ground that the certificate was issued through inadvertence, there is no reason why we cannot, having experienced a change of mind, do the same thing in other cases, and with respect to other carriers, in the years to come.

(3) Applicant states that in reliance upon the certificate issued on July 2, 1942, it has made plans to resume operations when permitted to do so by the War Shipping Administration and that it has made substantial expenditures and commitments to that end which it would not have made if it had reason to believe that its certificate could or would be changed or limited in any respect. It and a number of intervening water carriers vigorously contend that if certificates are subject to changes by us which will limit or restrict the services authorized therein, without the consent of the holders thereof, investment in shipping will be discouraged, improvements in transportation services will be hampered, and the declared policy of Congress will be defeated. I think there is considerable merit in this contention.

That Seatrain should be authorized to continue to transport commodities generally is not disputed. The purpose and effect of changing its certificate is so to restrict its operations as to permit it to transport such commodities only when they are loaded in railroad cars when tendered to it and then only when the railroad cars are received from and delivered to rail carriers without transfer of the property from such cars. It is to be prevented from using any space about its ships, not occupied by railroad cars,

in the transportation of property which it is authorized to haul. We should be reluctant to change an effective certificate by placing limitations or restrictions of this kind upon the services authorized therein even if we have power to do so. Such action is contrary to sound regulatory policy. The result of such action in this proceeding will be to encourage inefficient and uneconomical operations by both Seatrain and its break-bulk, water-carrier competitors. Seatrain alone will hold authority to transport commodities generally loaded in railroad cars between the ports of New York, New Orleans, and Texas City. This, I think, is contrary to the public interest. Common carriers by water should be authorized to transport the commodities specified in their certificates without restriction as to the containers in which such commodities are tendered and without restriction as to who shall deliver such commodities to the carrier and who shall take delivery thereof from the carrier.

It is not a satisfactory answer to the contention of Seatrain and of interveners to state that "our power to correct a certificate" should be exercised sparingly and, at the same time, to take the action which has been taken in the Foss case and in the instant case.

ALLDREDGE, Commissioner, dissenting:

I disagree with the action taken by the majority, but do so primarily on grounds of what I consider to be sound administrative policy rather than upon technical legal principles.

A certificate of public convenience and necessity issued under part III of the act, as this one was, is not irrevocable or immune to modification. With that much of the majority's views I agree. On the other hand, however, the decisions cited in the majority report do not, in my judgment, support the attitude there taken that a certificate is nothing more than an order which can
38 be modified or set aside like any other order. Plainly, the usual result of a certificate is the creation of a valuable right, as well as a substantial obligation to serve the public, and, consequently, its modification or revocation ought to be subject to definite limitations even if we have to create them by the exercise of our own discretion. It cannot be successfully questioned that the power generally inheres in any judicial or quasi-judicial body to correct its own mistakes. For example, the Commission would clearly have the authority to modify or revoke a certificate containing clerical errors, or one that was issued through inadvertence, or as the result of fraud or misrepresentation in its procurement. Such was not the case here, however. The certificate issued

to applicant in this instance was in conformity with the findings, and so far as the report of Division 4, which issued the certificate, discloses, the findings were not the result of inadvertence or oversight, but were the product of a deliberate exercise of judgment.

The conclusion is now reached upon further hearing and consideration that the certificate does not properly restrict applicant to the kind of transportation in which it was engaged and which it is entitled to continue. The obvious consequence of such action is to introduce an element of uncertainty and instability into the regulated water-carrier industry that is bound to react unfavorably, not only on the industry itself but also upon the public which Congress has undertaken, through regulation, to provide with an adequate, dependable, and economical system of transportation. One of the principal benefits of regulation is the stability that it lends to the industry regulated, the public being the ultimate beneficiary. An applicant to whom a certificate has been issued should be able to rely upon it as an authoritative determination of his rights and as a secure foundation upon which to build for the future. The certificate should not be subject to modification or revocation for unsubstantial reasons or even for a better considered afterthought. A reasonable period of time must, of course, be provided to enable any party to contest our findings in such matters, but the law and our General Rules of Practice contain such provision. In the instant proceeding the certificate was issued more than two and one-half years ago, so that that period has long ago expired. No party is here questioning the propriety of the certificate. The action taken is on our own initiative. In my opinion, what is done here, and more particularly what is said, is in derogation of sound regulatory policy.

PATTERSON, Commissioner, dissenting:

I doubt that, in the circumstances here present, we have the power to restrict the certificate previously issued, as is done by the majority. If we have the power I am of the view that it should not be exercised in this instance because of the time which has elapsed since the original certificate was issued, and also, because I regard as unwarranted an attempt to condition such a certificate upon transportation of the traffic in a freight car or any other specified type of container, for reasons more fully set forth in my dissent in Foss Launch & Tug Co. Application, — I. C. C. — (Docket No. W-587).

Commissioner AITCHISON was necessarily absent and did not participate in the disposition of this proceeding.

39 *Exhibit C*

CERTIFICATE AND ORDER

At a Session of the Interstate Commerce Commission, division 4, held at its office in Washington, D. C., on the 2nd day of July, A. D. 1942

No. W-543

SEATRAIN LINES, INC., COMMON CARRIER APPLICATIONS

Seatrain Lines, Inc., having filed applications under the provisions of section 309 (a) and (c) of the Interstate Commerce Act for a certificate of public convenience and necessity authorizing continuance of its operations as a common carrier by water, a full investigation of the matters and things involved having been made, and said division on the date hereof, having made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is hereby certified, That public convenience and necessity require the continuance of operations by Seatrain Lines, Inc., as a common carrier by self-propelled vessels, in interstate or foreign commerce, in the transportation of commodities generally between the ports of New York, N. Y., New Orleans, La., and Texas City, Tex., by way of the Atlantic Ocean and the Gulf of Mexico.

It is ordered, That said carrier be, and it is hereby, authorized to perform the service specified above, subject, however, to such terms, conditions, and limitations as are now, or may hereafter be, attached to the exercise of such authority by this Commission.

It is further ordered, That the holding of this certificate by said carrier be, and it is hereby, conditioned upon the exercise of the authority specified above, and upon compliance by said carrier with the requirements of the Interstate Commerce Act and the orders, rules, and regulations of the Commission thereunder.

It is further ordered, That the portion of the application seeking authority to transport passengers between New York and New Orleans be, and it is hereby, denied.

And it is further ordered, That this certificate and order shall take effect and be in force from and after August 10, 1942.

By the Commission, division 4.

[SEAL] W. P. BARTEL, *Secretary.*

40 *Exhibit D*

This report will not be printed in full in the permanent series of Interstate Commerce Commission reports.

INTERSTATE COMMERCE COMMISSION

No. W-543

SEATRAIN LINES, INC., COMMON CARRIER APPLICATIONS

Submitted December 6, 1941.—Decided July 2, 1942

1. Applicant found entitled to continue operation as a common carrier by self-propelled vesels in the transportation of commodities generally between the ports of New York, N. Y., and New Orleans, La., over specified routes, by reason of having been engaged in such operation on January 1, 1940, and continuously since, except for an interruption in service over which it had no control.

2. Public convenience and necessity found to require operation by applicant as a common carrier by self-propelled vessels in the transportation of commodities generally between the ports of New York and Texas City, Tex.

3. Certificate of public convenience and necessity issued, and application in other respects denied.

PARKER MCCOLLESTER for applicant.

REPORT OF THE COMMISSION

DIVISION 4, COMMISSIONERS PORTER, MAHAFFIE, AND MILLER

BY DIVISION 4:

By application filed May 29, 1941, Seatrain Lines, Inc., a corporation, of New York, N. Y., seeks a certificate of public convenience and necessity under the provisions of section 309 (a) of the Interstate Commerce Act authorizing continuance of operation as a common carrier by water, in interstate or foreign commerce, in the transportation of commodities generally and passengers between New York and New Orleans, La., by way of the Atlantic Ocean and the Gulf of Mexico.

By application filed on the same date applicant seeks a certificate under section 309 (a) and (c) of the act authorizing continuance of an operation instituted between January 1, 1940, and February 1, 1941, as a common carrier by water, in interstate or foreign commerce, in the transportation of commodities generally between New York and Texas City, Tex., by way of the Atlantic Ocean and the Gulf of Mexico.

No objection to the applications has been offered.

In June and July 1941, two of applicant's vessels were requisitioned by the United States Maritime Commission, and the other three vessels were requisitioned by May 21, 1942, at which time all of applicant's operations between ports in the United States were discontinued. Such interruption of service was one over which the applicant had no control and, therefore, should not prevent it from obtaining a certificate authorizing continuance of the operations in which it was engaged on January 1, 1940.

NEW YORK-NEW ORLEANS OPERATION

Applicant operated three vessels on January 1, 1940, and transported 500,000 and 750,000 tons of freight in 1939 and 1940, respectively. Less tonnage was transported during 1941 because two of applicant's vessels had been requisitioned for na-
41 tional defense uses. On January 1, 1940, these vessels could operate only between docks located at Hoboken, N. J., and Belle Chasse, La., via Havana, Cuba, because the special facilities for loading and unloading the vessels existed only at these points. While the actual operation has been between docks at Hoboken and Belle Chasse, it has consisted of service to points which are within the ports of New York and New Orleans, respectively, and the operation should be authorized to and from these ports. Thames River Line, Inc., Common Carrier Application, W–618, decided April 16, 1942, mimeographed.

The "seatrain" type of vessel operated by applicant has four decks, each of which has four sets of standard gauge railroad tracks amounting, in the aggregate, to approximately one mile in length. The first vessel built for this purpose has a capacity of 95 freight cars and tanks holding over 2,000 tons of liquid cargo. The newer vessels will accommodate 100 freight cars and 4,000 tons of liquid cargo.

Applicant seeks authority to continue transportation of passengers between New York and New Orleans. Each vessel has accommodations for 2 passengers, and applicant contends that to the limit of its facilities and availability of space it has held itself out to transport, and has transported, passengers on its regular cargo trips. During 1938, 106 passengers were carried, but these were all employees of the company and were not transported for compensation. In 1939, 184 passengers were carried, but 178 of these were non-revenue passengers; and of the 6 revenue passengers 5 embarked in Havana and one debarked there. No revenue passengers and 106 nonrevenue passengers were transported during 1940.

A finding that applicant was in bona fide operation on January 1, 1940, requires evidence of actual operation as a common carrier

of passengers on that day or during a period of time including that date. Potential ability to operate is not enough. The fact that applicant did not transport passengers for compensation between New York and New Orleans during 1938, 1939, and 1940, shows that such operations were not in existence on January 1, 1940. For that reason the application will be denied insofar as it seeks authority to transport passengers between these points.

NEW YORK-TEXAS CITY OPERATION

In 1939 applicant contracted for, and in 1940 obtained two additional "seatrain" type vessels. Since May 24, 1940, applicant has operated a transportation service on regular schedules as a common carrier by water between New York and Texas City, at times via Havana. Until July 5, 1940, the service was fortnightly. After that date and until requisition of applicant's vessels, as described above, service between these points was on a weekly schedule.

In Investigation of Seatrain Lines, Inc., 195 I. C. C. 215, the Commission found applicant to be a common carrier by water engaged in the transportation of property partly by railroad and partly by water. In Investigation of Seatrain Lines, Inc., 206 I. C. C. 328, under the provisions of section 5 (19–21) of the act, the Commission found that the service of applicant between Hoboken and New Orleans (Belle Chasse) "is being operated in the public interest and is of advantage to the convenience and commerce of the people and that extension of the time within which such service may continue will neither exclude, prevent nor reduce competition on the route by water under consideration." In the course of these investigations a number of shippers, representatives of chambers of comerce, and others appeared in support of the operation conducted by applicant and developed the public need for applicant's service to Gulf ports.

The advantage of transportation by "seatrain" lies principally in the fact that, when compared with other carriers by water, it offers an expedited service to shippers in carload lots. Loading and unloading machinery enables a vessel to be completely unloaded and reloaded at a port within 21 hours. Between ports these vessels attain speeds of 16.5 knots or better. Service to inland points is facilitated by reason of the fact that, instead of the expenses and delays which are ordinarily incident to
42 the transfer of lading between vessels and freight cars, upon being unloaded from applicant's vessels the loaded freight cars can immediately proceed to inland destinations.

During the three months ending March 31, 1941, applicant's books show an increase of approximately $174,000 in net income over the same period of the previous year. Applicant estimates

that practically all of this increase resulted from the addition of service to Texas City.

In view of the advantages of applicant's method of operation, and the fact that this operation has been used to the limit of applicant's capacity since institution of the service, we are of the opinion it has been clearly shown that it is fit, willing, and able to continue the operation, and that the present and future public convenience and necessity require its continuance.

We find that Seatrain Lines, Inc. was in bona fide operation on January 1, 1940, as a common carrier by self-propelled vessels, in interstate or foreign commerce, in the transportation of commodities generally between the ports of New York and New Orleans, by way of the Atlantic Ocean and the Gulf of Mexico; and that such operation has been continued since that date, except for an interruption of service over which applicant had no control.

We further find that the present and future public convenience and necessity require operation by applicant as a common carrier by self-propelled vessels, in interstate or foreign commerce, in the transportation of commodities generally between the ports of New York and Texas City, by way of the same route; and that applicant is fit, willing, and able to continue the operation.

We further find that applicant is entitled to a certificate authorizing such operations, subject, however, to general conditions which are necessary to carry out, with respect to continuance of applicant's operations, the requirements of part III of the act and the orders, rules, and regulations of the Commission thereunder. For the reasons given above, that portion of the application seeking authority to transport passengers between New York and New Orleans will be denied.

An appropriate certificate and order will be issued.

42-A *Exhibit E*

ORDER

At a Session of the Interstate Commerce Commission, Division 4, held at its office in Washington, D. C., on the 18th day of December, A. D. 1943

No. W-543

SEATRAIN LINES, INC., COMMON CARRIER APPLICATION

Upon further consideration of the record in the above-entitled proceeding and good cause appearing therefor:

It is ordered, That this proceeding be, and it is hereby, reopened for reconsideration.

By the Commission, division 4.

[SEAL] W. P. BARTEL, *Secretary.*

43

Exhibit F

INTERSTATE COMMERCE COMMISSION

BUREAU OF WATER CARRIERS AND FREIGHT FORWARDERS

WASHINGTON

25

DECEMBER 31, 1943.

Mr. PARKER MCCOLLESTER,
Lord, Day and Lord,
25 Broadway, New York, N. Y.

Re: Seatrain Lines, Inc. Common Carrier
Application, No. W-543

DEAR SIR: Further consideration has been given the record in the above-entitled proceeding in which you alone appeared. The certificate issued by Division 4 with its report of July 2, 1942, probably does not appropriately describe the operations of Seatrain Lines, Inc., on and since January 1, 1940.

The certifying paragraph of the certificate and order reads as follows:

"It is hereby certified, That public convenience and necessity require the continuance of operations by Seatrain Lines, Inc., as a common carrier by self-propelled vessels, in interstate or foreign commerce, in the transportation of commodities generally between the ports of New York, N. Y., New Orleans, La., and Texas City, Tex., by way of the Atlantic Ocean and the Gulf of Mexico."

Enclosed is a copy of a report on reconsideration in W-587, Foss Launch & Tug Co. It will be noted that the certificate issued that company provided for "the transportation of commodities generally." Substantially the same wording was used in the certificate issued in that case and in W-543, your case. The Foss company construed the phrase authorizing "transportation of commodities generally" to include the right to begin operations in so-called car-ferry service. That presented an issue which the division has considered in its report upon reconsideration in the Foss case.

This leads directly to the further consideration of the wording of the certificate issued Seatrain Lines, Inc. Division 4 has reopened that proceeding for further consideration. It is thought that the enclosed copy of draft of report sets forth the reasons for issuing Seatrain Lines, Inc. an amended certificate and order. This amended certificate and order specifically describes the par-

ticular service and operation in which applicant was engaged on and since the statutory date. It is thus protected in that service and operation. The division has directed that a copy of the draft and the draft of amended certificate and order be submitted to you for your consideration and comment.

Your early advice in the premises will be appreciated.

Yours very truly,

Jno. F. Girault,
JOHN F. GIRAULT,
Assistant Director.

Att.

44 *Exhibit G*

INTERSTATE COMMERCE COMMISSION

No. W-543

SEATRAIN LINES, INC., COMMON CARRIER APPLICATIONS

Decided ————

Upon reconsideration, finding in prior report of July 2, 1942, not printed, modified, and Seatrain Lines, Inc., found entitled to continue operation as a common carrier, by the "seatrain" type of vessels, in interstate or foreign commerce, in the transportation of liquid cargoes, in bulk; of empty railroad cars; and of property loaded in freight cars received from and delivered to rail carriers and transported without transfer, between the ports of New York, N. Y., New Orleans, La., and Texas City, Tex., by way of the Atlantic Ocean and the Gulf of Mexico. Prior certificate and orders superseded and canceled and amended certificate and order issued.

Appearance shown in prior report.

REPORT OF THE COMMISSION ON RECONSIDERATION

DIVISION 4, COMMISSIONERS PORTER, MAHAFFIE, AND MILLER

BY DIVISION 4:

In the prior report issued July 2, 1942, not printed, we found, among other things, that applicant was entitled to continue operation as a common carrier by self-propelled vessels, in interstate or foreign commerce, in the transportation of commodities generally between the ports of New York, N. Y., New Orleans, La., and Texas City, Tex., by way of the Atlantic Ocean and the Gulf

of Mexico. A certificate and order was issued which became effective August 10, 1942. Upon our own motion we reopened the proceeding for reconsideration.

Applicant operated special vessels called "seatrains" designed solely for the transportation of railroad freight cars and liquid cargoes. The "seatrain" type of vessel and the nature of applicant's operations are described in our prior report and Investigation of Seatrain Lines, Inc., 195 I. C. C. 215, 219, 220.

Although applicant limited its service to transportation by that kind of vessels, the certificate issued with our prior report authorized it to engage in the transportation of commodities generally. Since then we have had occasion to consider whether the certificate issued is proper, in view of the facts of record and the construction that may be placed upon "transportation of commodities generally." In other proceedings in which we had before us applications relating to operations of carriers engaged in transporting loaded and empty freight cars, in what is called freight-car ferry service, in connection with common carriers by railroads, we have classified such transportation as a separate and distinct service not embraced within the authority to transport commodities generally. Foss Launch & Tug Co. Applications, No. W-587, — I. C. C. —, decided ———. See also Puget Sound Navigation Co. Common Carrier Application No. W-361, decided April 15, 1942, not printed, and Puget Sound Tug & Barge Co. Applications, 250 I. C. C. 791. In the proceedings cited the services were performed by non-self-propelled car-barges with separate towing vessels. Such transportation performed by self-propelled vessels is also a separate and distinct service. As distinguished from the services usually performed by water carriers engaged in the transportation of commodities generally by self-propelled vessels, all freight transported by Seatrain Lines, other than liquid cargoes in bulk and empty railroad cars, has been moved in freight cars and was received from and delivered to rail carriers without transfer from the cars. Applicant limited itself to that class of service, and therefore the authority granted should likewise be limited. Such limitation will not restrict applicant beyond the clear requirements of the statute; and will preserve its position in the national transportation system. See United States v. Carolina Freight Carriers Corp., 315 U. S. 475, and Crescent Express Line, Inc. v. The United States, et al. (No. 65 decided by the Supreme Court December 6, 1943), and cases cited therein.

Upon reconsideration, we find that Seatrain Lines, Inc. is entitled to a certificate authorizing it to continue operation as a common carrier by the "seatrain" type of vessels, in interstate or foreign commerce, in the transportation of liquid cargoes in

bulk; of empty railroad cars; and of property loaded in freight cars received from and delivered to rail carriers, and transported without transfer from the freight cars between the ports of New York, New Orleans, and Texas City by way of the Atlantic Ocean and the Gulf of Mexico, subject, however, to general conditions which are necessary to carry out with respect to the continuance of applicant's operation, the requirements of part III of the act and the orders, rules and regulations of the Commission thereunder. In all other respects the findings and conclusions in the prior report are affirmed.

The certificate and order heretofore entered in this proceeding will be superseded and canceled, and an amended certificate and order will be issued to conform with our findings herein.

45-A *Exhibit H*

AMENDED CERTIFICATE AND ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 4, held at its office in Washington, D. C., on the — day of ———, A. D., 1943

No. W-543

SEATRAIN LINES, INC., COMMON CARRIER APPLICATIONS

Further consideration having been had of the record in this proceeding, and said division, on the date hereof, having made and filed a report on reconsideration containing its findings of fact and conclusions thereon, which report, together with the prior report of July 2, 1942, is hereby referred to and made a part hereof:

It is hereby certified, That public convenience and necessity require the continuance of operation by Seatrain Lines, Inc., as a common carrier by the "seatrain" type of vessels, in interstate or foreign commerce, in the transportation of liquid cargoes in bulk; of empty railroad cars; and of property loaded in freight cars received from and delivered to rail carriers and transported without transfer from the freight cars between the ports of New York, N. Y., New Orleans, La., and Texas City, Tex., by way of the Atlantic Ocean and the Gulf of Mexico.

It is ordered, That said carrier be, and it is hereby, authorized to perform the service specified above, subject, however, to such terms, conditions, and limitations as are now, or may hereafter be, attached to the exercise of such authority by this Commission.

It is further ordered, That the holding of this certificate by

said carrier be, and it is hereby, conditioned upon the exer-
46 cise of the authority specified above, and upon compliance by said carrier with the requirements of the Interstate Commerce Act and the orders, rules and regulations of the Commission thereunder.

It is further ordered, That the portion of the application seeking authority to transport passengers between New York and New Orleans be, and it is hereby, denied.

And it is further ordered, That the certificate and order issued on July 2, 1942, be, and it is hereby superseded and canceled as of the effective date of this amended certificate and order; and that this amended certificate and order shall take effect and be in force from and after

By the Commission, division 4.

[SEAL] W. P. BARTEL, *Secretary.*

46-A *Exhibit I.*

LORD, DAY & LORD
25 BROADWAY, NEW YORK
Cunard Building

JANUARY 20, 1944.

Mr. JOHN F. GIRAULT,
Assistant Director, Bureau of Water Carriers and Freight Forwarders, Interstate Commerce Commission,
Washington 25, D. C.

Seatrain Lines, Inc. Common Carrier Application No. W-543

DEAR MR. GIRAULT: This will have reference to your letter of December 31st in regard to the above application. With your letter you enclosed a suggested report of Division 4 on reconsideration and a suggested amended certificate and order to be issued by Division 4.

I apologize for my delay in replying to your letter but the press of other matters has prevented me from sooner giving to the matter the study which it merits because of the effect of what is suggested upon my client.

I have now discussed your letter and its enclosures with the officers of Seatrain Lines, Inc. I beg to inform you that we cannot agree with the suggestions made and believe that the suggested report on reconsideration and the proposed amended certificate and order would be a mistake and based upon incorrect assump-

tions. There are several reasons for our position, which proceeds primarily not from the particular facts as to Seatrain, although your letter and the enclosed suggestions reflect an erroneous impression of these facts, but rests rather upon the language
47 and purpose of the Act and upon the general public interest in the promotion of a strong, vigorous and progressive merchant marine in the coastwise trade.

First of all, I submit a legal objection to what is suggested. Although this may be a minor and somewhat technical point, I nevertheless believe that there is a purpose in the statute which would be defeated by the Commission's proceeding as you suggest. The point is that the Commission has not yet established any such classifications of groups of carriers as the suggested report and order assume and unless and until it has done so I believe that it is not within the powers of the Commission to limit the authority granted to a water carrier in the manner proposed as though such classifications had previously been established.

Paragraph (c) of Section 304 provides:

"The Commission may establish from time to time such just and reasonable classifications of groups of carriers included in the the terms 'common carrier by water,' or 'contract carrier by water,' as the special nature of the services performed by such carriers shall require; and such just and reasonable rules, regulations, and requirements consistent with the provisions of this part to be observed by the carriers so classified or grouped, as the Commission, after hearing, finds necessary or desirable in the public interest."

I think this clearly contemplates that if carriers are to be classified, the Commission shall first adopt and establish classifications of groups of carriers and presumably shall conduct investigations and hold hearings for the purpose of determining what these classifications should be. It seems to me necessary that the classifications be established in advance because only in this way will carriers be upon notice and have an opportunity to present proof and argument as to why they fall within one or more classes rather than others. This is the sort of procedure which is contemplated by the petition which has been filed by Detroit & Cleveland Navigation Company and other carriers on the Great Lakes, dated November 11, 1943, which asks the Commission to institute a general investigation for the purpose of establishing classifications of water carriers.

It is my view, therefore, that the Commission, in dealing with the application of an individual carrier, may not conclude that its services are of a special nature and that therefore it is in a particular class and that its certificate should be limited accordingly when no such classification has been previously established. For

this reason I think the procedure followed in Foss Launch & Tug Company Application No. 587 was in error and invalid. It certainly was unfair.

The second point, which from the standpoint of the general public interest is much the most important, is that in our view it is not only impractical but would be highly detrimental to the development of a strong and progressive merchant marine in the coastwise and intercoastal trades for the Commission, under the guise of classifying carriers, to attempt to impose restrictions or limitations upon the kinds of vessels or of freight handling equipment to be employed by water carriers or to control the way in which they may handle freight.

It is my own opinion, which I have previously voiced to the Commission that the Commission has already gone too far in the decisions to which you refer, in placing water carriers in a straight jacket by making a distinction between carriers engaged in transportation by self-propelled vessels and those performing their service by non-self-propelled vessels. It seems to me that the shipping public is concerned with securing efficient and economical water transportation and not with whether the motive power is inside or outside the hull of a ship, just as it is immaterial to a shipper by truck (except as it affects costs and rates) whether a motor carrier employs tractors and trailers or uses vehicles in
which the motive power and cargo space are on the same
48 chassis, and just as it does not concern a shipper by railroad whether a railroad employs a locomotive to haul cars or uses multiple unit trains where the motors are in the individual cars.

The war is likely to bring great developments in water transportation. We have already seen the development by Chrysler Corporation of a propulsion unit outside the cargo hull of a vessel. It may well promote efficient and economical water transportation for some carriers which formerly used vessels with self-contained engines to remove the engines, thereby increasing the cargo capacity of the hulls, and employ separate power units. The point is that it is in the interest of the shipping public to have transportation by carriers—be they railroads, trucks, or water carriers—performed in the most efficient, economical and satisfactory way, and the design, type, size and speeds of ships, like the design and types of railroad cars must vary with volume, distance, types of cargo and the state of the art and restrictions upon the freedom of carriers to adopt particular kinds of vessels or vehicles would run counter to the public interest. Especially is this true in the shipping industry.

The war has demonstrated the vital necessity of having an ocean-going merchant marine available at all times with ships,

terminals, and trained personnel. As has been often said, had it not been for the coastwise and intercoastal fleets, the Germans probably could not have been stopped at El Alamein. However, if there is any industry which for its future welfare and existence under private ownership requires that every inducement be offered to improvements in methods of operation, it is the shipping industry. One of the problems of the shipping industry, particularly in the coastwise trade, is the expense of stevedoring and handling at the ports and the length of time vessels must remain in port for this purpose. It might be suggested that Seatrain should welcome a classification such as that proposed because it would give Seatrain a preferred position in the right to transport freight in railroad cars without breaking bulk because other steamship lines which formerly handled freight in the ordinary break-bulk cargo vessels could not engage in transportation in this way without prior application to the Commission. However, Seatrain does not seek such an advantage for itself because it believes that the general welfare of all coastwise transportation is of far greater importance than the temporary competitive advantage which it might itself enjoy. We believe that other established water carriers in the coastwise trade, whatever the type of vessel they may previously have employed and the methods which they may have used in handling cargo, should be free to employ other types of ships or other devices and to adopt new improvements as they may appear which will promote economy and improve coastwise transportation without the burden and long delays of proceedings before the Commission to obtain permission to do so. We are convinced that the declared policy of Congress would be defeated by any such attempted classification as your letter suggests and that it would be contrary both to the purpose and the language of the Act.

If the Commission shall follow such a course of restricting the methods of operation employed by water carriers through the medium of classification, it will certainly be open to the charge of subjecting water carriers to impediments which it has not interposed in the case of rail transportation. For example, it was never suggested when the New York Central and the Pennsylvania inaugurated the use of removable containers and container cars for the transportation of freight that they were engaging in a new type of transportation which required them to secure a new certificate of convenience and necessity therefor. And yet this was a radical innovation in the method of handling and in the service afforded to shippers of package freight, brick, etc. When the so-called dry-flow hopper car was placed in operation for the movement of cement, eliminating the use of bags, this afforded cement shippers a service differing as much from that of

49 shipment in bags in boxcars as does shipment in through cars via Seatrain from shipment via a break-bulk water carrier. But it was not suggested that the railroads could not use these cars without a new certificate from the Commission. When certain western railroads entered into arrangements for the through transportation of freight by rail and highway by carrying trucks or trailers on flat cars, it was not suggested that this was a new type of transportation in which they could not engage without obtaining new certificates. Examples could be multiplied. The Commission has properly regarded the railroads as engaged in transportation by railroad and has considered that their rights cover any variations or improvements in particular methods employed by them in accomplishing the transportation and handling of freight by railroad. They have been encouraged to develop improvements in their equipment and operating methods. We submit that a water carrier likewise is nothing but a water carrier and is engaged in transportation by water. Water carriers should be encouraged to develop new techniques in the art of water transportation, and should be under no greater restrictions in so doing than are the railroads. Whether they load vessels through side ports, whether they carry freight on trucks or trailers, in boxes stowed in the hold, in racks or in any other devices, or whether they employ booms, elevators, cranes, runways, skids, or other facilities to load and discharge cargo, they remain carriers by water and the business in which they are engaged is transportation by water. The methods are matters of operating technique and we believe they should be so regarded in administering Part III.

We cannot conceal the impression which is quite generally shared by those interested in or concerned with water transportation, that in the administration of Part III there has developed a tendency to interpret and enforce the provisions of Part III to restrict, hamper, and discourage water transportation and the suggestion contained in your letter seems to be another indication of such a tendency. It would be regrettable if the Commission should so apply the Act that resort had to be had to the Congress in order to recreate conditions under which a domestic merchant marine can be encouraged and will thrive after the war.

Finally, so far as Seatrain's own situation is concerned, even if such a classification as your letter suggests were justified and in the public interest, you are incorrect in assuming that Seatrain under the "grandfather" clause would be entitled only to the limited certificate suggested by your letter.

The suggested report on further hearing states that

"Applicant operated special vessels called 'seatrains' designed solely for the transportation of railroad freight cars and liquid cargoes."

On the next page it is stated that

"applicant limited its service to transportation by that kind of vessels."

Again it is said that

"all freight transported by Seatrain Lines, other than liquid cargoes in bulk and empty railroad cars, has been moved in freight cars and was received from and delivered to rail carriers without transfer from the cars. Applicant limited itself to that class of service, and therefore the authority granted should likewise be limited."

All of these statements are incorrect and contrary to the facts. It is true, of course, that Seatrain's vessels were designed primarily for the transportation of freight in railroad cars or in side tanks but it is not the fact that they were "designed solely" for transportation of freight in this manner or that "all freight transported by Seatrain Lines * * * has been moved in freight cars and was received from and delivered to rail carriers without transfer from the cars." Neither is it a fact that Seatrain has ever limited itself to that class of service.

Seatrain's tariffs contain no limitations as to the manner in which freight will be carried. On traffic as to which Seatrain is competitive with other water carriers in the coastwise trade its rates are subject to the same packing requirements as apply in connection with the rates of the latter. It holds itself out and is obligated to accept freight packed in accordance with these requirements whether or not such freight is tendered to it in cars. Moreover, it has carried a considerable volume of freight of various kinds not in railroad cars and a still greater volume of freight has been tendered to it both by shippers and by connecting rail and water carriers not in railroad cars.

The form of "Amended Certificate and Order" which you transmitted would limit Seatrain to the transportation "of property loaded in freight cars received from and delivered to rail carriers and transported without transfer from the freight cars."

This would immediately prevent Seatrain from carrying a large part of the freight which it has transported from the beginning of its operations. A considerable proportion of the cargo which Seatrain has transported has been received, not from railroads but from shippers or from connecting water carriers. Seatrain delivers freight, not alone to railroads but to consignees, to water carriers in the foreign trade, to barges, etc. Seatrain has maintained interior freight stations at the ports for the receipt and

delivery of freight which obviously was not received and delivered in cars. It was ordinarily handled between the freight stations and Seatrain's piers by truck. How it should be carried on the vessels, whether loaded in cars or in the hold depended on conditions. If there were cars available which would otherwise move empty, it was ordinarily loaded in cars. But it was often uneconomical to obtain cars and the freight was carried to the port of discharge in the hold or on deck. Even freight received in cars from railroads is often transferred because the cars are too large, or are defective, or in order to promote more efficient use of cars by employing home routed cars that would otherwise move empty. At times the freight when removed from cars is carried loose in the hold and not loaded into cars at all.

Your misunderstandings in these regards doubtless result from the fact that at the times of the proceedings before the Commission, the Commission's jurisdiction over water carriers was limited to through transportation under common arrangements with the railroads and jurisdiction over port-to-port traffic rested with the Maritime Commission. Consequently, in the proceedings before the Interstate Commerce Commission the evidence related only to transportation engaged in by Seatrain which was subject to the jurisdiction of that body. Seatrain, however, had port-to-port rates on file with the Maritime Commission which, like those filed with the Interstate Commerce Commission, were not limited in any way to freight in cars. Moreover, as I have said, even as to through freight interchanged with railroads a considerable part, as you may find from the Hoboken Divisions Case, was for the convenience of the railroads interchanged with Seatrain by railroad lighters, involving removal from cars. Seatrain was obligated to accept and transport freight thus tendered to it.

That Seatrain generally, for its own convenience, saw fit to load into cars the freight tendered to it loose was merely a matter of its own choice as to the method of handling and stowage.

We have welcomed your letter for the reason that it has afforded an opportunity to inform the Commission as to certain facts regarding Seatrain operations as to which confusion or misunderstanding may well have resulted from the limitation of the issues in the proceedings before it and the nature of the evidence confined as it had to be to such issues. The ideas that Seatrain carries only freight in cars, that it must operate only between fixed termini, that it carries only freight interchanged with rail-
51 roads—these are ideas which are erroneous and should be dispelled.

The Commission's field investigators who examined Seatrain's records in connection with its application should have learned of

the foregoing facts but, if not, we of course stand ready to furnish proof thereof if this letter cannot be accepted as such.

Very truly yours,

PARKER MCCOLLESTER.

PMcC:MM.

c/c Division 4, Interstate Commerce Commission: Hon. Claude R. Porter, Hon. Charles D. Mahaffie, Hon. Carroll Miller.

51-A *Exhibit J*

At a Session of the Interstate Commerce Commission, Division 4, held at its office in Washington, D. C., on the 27th day of January, A. D. 1944

No. W-543

SEATRAIN LINES, INC., COMMON CARRIER APPLICATIONS

It appearing, That on December 18, 1943, Division 4, upon further consideration of the record in the above-entitled proceeding, and good cause appearing therefor, reopened the said proceeding for reconsideration:

And it further appearing, That question has arisen as to whether the findings of Division 4 in its report of July 2, 1942, and the certificate and order issued in connection therewith on that date, which certificate and order became effective on August 10, 1942, and which authorize applicant to operate as a common carrier by self-propelled vessels, in interstate or foreign commerce, in the transportation of commodities generally between the ports of New York, N. Y., New Orleans, La., and Texas City, Tex., by way of the Atlantic Ocean and the Gulf of Mexico, are not too broad.

It is ordered, That the said proceeding be, and it is hereby reopened for hearing upon the question of whether or not the said findings and certificate and order of July 2, 1942, should be modified so as to authorize applicant to continue to operate in service in which it was engaged, except for interruptions beyond its control, namely, as a common carrier by the "Seatrain" type of vessels in the transportation of liquid cargoes in bulk; of empty
52 railroad cars, and of property loaded in freight cars received from and delivered to rail carriers and transported without transfer from the freight cars between the ports above mentioned.

And it is further ordered, That this proceeding be, and it is hereby assigned for hearing at the offices of the Commission in Washington, D. C., at 9:30 A. M. on February 28, 1944, before Commissioner Porter and Examiner Copenhafer.

By the Commission, Division 4.

[SEAL] W. P. BARTEL, *Secretary*.

52-A *Exhibit K*

BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. W-543

SEATRAIN LINES, INC., COMMON CARRIER APPLICATION

Motion for vacation or rescission of order reopening proceeding and for discontinuance of proceeding pursuant thereto.

Now, comes Seatrain Lines, Inc., applicant in the above-entitled proceeding, and respectfully moves that the Commission vacate or rescind its order issued through Division 4, dated January 27, 1944, reopening this proceeding for hearing and assigning it for hearing; and as ground for its motion, applicant alleges and respectfully submits that the purpose for which the proceeding is reopened and the hearing set, as defined in said order, namely, to determine whether or not the certificate issued by the Commission's order of July 2, 1942, should not be modified to alter, limit and restrict the rights granted by said certificate as therein defined and thereby to withdraw or annul said rights in certain respects, is a purpose which is beyond the power of the Commission in that since no fraud or misrepresentation or failure to disclose any pertinent facts in connection with the application for or issuance of the certificate existed or is alleged, since no objection was made to the scope or form of the authority granted by said order during the period before it became effective and since said order and the certificate thereby granted became effective on August 10,
53 1942, therefore, the certificate and order are not now subject to modification which will alter, restrict, limit, withdraw or annul the operating rights which were granted thereby. In support of its motion, applicant represents further as follows:

THE FACTS

Applicant filed two separate applications under the provisions, respectively, of the so-called "grandfather" clause and of the so-called "interim" clause of Section 309 (a) of Part III of the Interstate Commerce Act. By the terms of these clauses the two applications raised different issues.

On or about May 28, 1941, applicant seasonably filed its application under the "grandfather" clause of Section 309 (a) of the Act for the issuance to it of a certificate of convenience and necessity authorizing it as a common carrier to engage in the transportation by water of property generally between the port of New York and the port of New Orleans, either via Havana, Cuba, or direct. Supporting data were attached to the application indicating that

on and prior to January 1, 1940, and continuously since that time applicant had been engaged in such transportation. Notice of the application was served upon all known water line competitors of the applicant, namely, Pan-Atlantic Steamship Corporation, Southern Steamship Company, Southern Pacific Company (Southern Pacific Steamship Lines "Morgan Line"), The Bull Steamship Line. So far as applicant is informed, no protest or objection was filed to the issuance of the certificate prayed for. A field examiner of the Commission examined applicant's records, interviewed its officers and secured such additional data as he asked for.

On or about May 28, 1941, a second and separate application under the so-called "interim" clause of Section 309 (a) of the Act was seasonably filed by the applicant praying the issuance to it of a certificate of convenience and necessity authorizing it to engage as a common carrier by water in the transportation of property generally between the ports of New York, N. Y., and Texas City, Texas. Applicant represented that on February 1, 1941, it was engaged in the operation for which authorization was sought. Notice of the application was served upon all known water carrier competitors, being those listed above, and supporting data were presented. A field examiner of the Commission examined the applicant's records and interviewed its officials. Further supporting data were thereafter presented in the form of communications from shippers stressing their need for the service. Reference was also made to other proceedings before the Commission in which proof had been offered and findings had been made that the public interest required the transportation service provided by applicant for which a certificate was sought. So far as is known, no protest or opposition was presented to the granting of this certificate as prayed for.

The two separate applications were given the same docket number by the Commission. When applicant was advised of this fact, it directed the Commission's attention to the circumstance that the two applications were filed under separate provisions of the statute and might raise different issues. In reply to this letter, the Assistant Director of the Commission's Bureau of Water Carriers advised the applicant that "Our records clearly show two different types of applications and I assure you that they will each receive careful consideration." Thereafter followed the investigations by the Commission's field examiner previously referred to, and further data were supplied to the Commission.

On July 2, 1942, Division 4 in a single report made its findings with respect to both operations covered by the two separate applications. On the first application it made the following finding:

"We find that Seatrain Lines, Inc. was in bona fide operation

on January 1, 1940, as a common carrier by self-propelled vessels, in interstate or foreign commerce, in the transportation of commodities generally between the ports of New York and New
54 Orleans, by way of the Atlantic Ocean and the Gulf of Mexico; and that such operation has been continued since that date, except for an interruption of service over which applicant had no control."

On the second application it found:

"We further find that the present and future public convenience and necessity require operation by applicant as a common carrier by self-propelled vessels, in interstate or foreign commerce, in the transportation of commodities generally between the ports of New York and Texas City, by way of the same route; and that applicant is fit, willing, and able to continue the operation."

Division 4 then issued its certificate and order. It thereby certified

"That public convenience and necessity require the continuance of operations by Seatrain Lines, Inc., as a common carrier by self-propelled vessels, in interstate or foreign commerce, in the transportation of commodities generally between the ports of New York, N. Y., New Orleans, La., and Texas City, Tex., by way of the Atlantic Ocean and the Gulf of Mexico."

The order provided

"That this certificate and order shall take effect and be in force from and after August 10, 1942."

No objection and no request for postponement having been made, the certificate and order took effect on August 10, 1942, and have been in effect since that time.

Applicant has incurred substantial expense and made important commitments pursuant to and in reliance upon the certificate as issued. Now, by its order of January 27, 1944, a year and a half after the certificate became effective, Division 4 has reopened the proceeding for hearing upon the question whether the certificate should not be modified to withdraw or limit the character and extent of the authority granted thereby.

THE LAW

We submit that under the statute, since the order and certificate of the Commission, dated July 2, 1942, became effective without objection by competing carriers or others on August 10, 1942, and since there is no suggestion or basis for a suggestion of fraud or misrepresentation or withholding of any facts in connection with the applications or the issuance of the certificate, the authority granted by the certificate may not now be limited, restricted or withdrawn.

The question of the power of the Commission to withdraw, rescind or change adversely to the carrier the scope and nature of operating rights granted by a certificate which has become effective was thoroughly considered by the entire commission in Smith Bros. Revocation of Certificate, 33 M. C. C. 465. In that case, which has been followed in many later proceedings, the Commission definitely concluded that when a certificate and order have once become effective, the rights therein granted may be relied upon and are not subject to withdrawal or limitation in whole or in part. The Smith Bros. case was a proceeding with reference to a certificate issued to a motor carrier under the provisions of Part II corresponding to Section 309 of Part III. After consideration and reconsideration, 22 M. C. C. 524 and 26 M. C. C. 219, and finally after oral argument, the entire Commission ruled, 33 M. C. C. 465, 472:

"In our opinion, the language of the foregoing section is clear and definite and unmistakably shows that Congress intended that a certificate, once effective, may be terminated by us only on the conditions, and according to the procedure, therein specifically provided. We may issue decision upon decision, and
55 order upon order, on an application for a certificate so long as sufficient reason therefor appears and until all controversy is determined, *but once a certificate, duly and regularly issued, becomes effective, our authority to terminate it is expressly marked off and limited.* All the antecedent decisions and orders are essentially procedural in character, and may be set aside, modified, or vacated, but *the certificate marks the end of the proceeding, just as the entry of a final judgment or decree marks the end of a court proceeding.* To hold that under section 208 (a) we have the power to include in certificates self-executing forfeiture terms, conditions, or limitations would make section 212 (a) merely surplusage and would wipe out the stability and certainty with respect to operating rights of common carriers by motor vehicle required in the public interest and contemplated by the act.

"In expressing the views stated above, we do not desire to be understood as holding that a certificate obtained by fraud, or misrepresentation, or one issued in error by this Commission, may not be changed or revoked without proceeding under section 212 (a). Here, there is no question of fraud, misrepresentation, or a certificate issued in error.

"We therefore concur in the conclusion of division 5 that, irrespective of the self-executing forfeiture term or condition in respondents' certificate, the certificate continues in full force and effect unless and until terminated by us in accordance with the provisions in section 212 (a)." [Italics ours.]

It is, of course, noted that in the certificate granted to Seatrain, the reservation has been included that the applicant is authorized to perform the service specified,

"subject, however, to such terms, conditions, and limitations as are now, or may hereafter be, attached to the exercise of such authority by this Commission."

This language incorporates into the certificate the substance of Section 309 (d). However, although conditions may be attached to the exercise of the privileges granted by a certificate, the extent and nature of the authority itself may not be limited nor may the rights thereunder be revoked or recalled. The Commission so held in the Smith Bros. case, where it said (pp. 471–472):

"*The power to attach terms, conditions, and limitations granted by the above section is a broad one, but* it is questionable whether it was intended that we should regulate service through 'terms, conditions, and limitations,' in view of the fact that in section 204 (a) (1) we are given the power to 'establish reasonable requirements with respect to continuous and adequate service.' Assuming but not determining that we can regulate service through 'terms, conditions, and limitations,' *even such a broad power is inadequate to permit what in effect is a modification of a separate provision of the act.* The United States Supreme Court has frequently held that the Commission is an agency of limited powers and authority; that, while Congress may delegate to the Commission certain of its own powers and authority, the exercise of such delegation does not extend beyond expressed enactment or its fairly implied inferences; and that important powers should not be read into the act by implication but should be conferred in clear and unmistakable terms. Thompson v. United States, 246 U. S. 547; United States v. Pennsylvania R. Co., 242 U. S. 208; and Interstate Commerce Commission v. Cincinnati, N. O. & T. P. Ry. Co., 167 U. S. 479. We have also found that, in the absence of specific language, only the most unmistakable evidence of the intention to confer upon us the power to act under given circumstances would warrant the assumption of such power through our own construction of the act. Wisconsin R. Comm. v. Chicago & N. W. Ry Co., 87 I. C. C. 195.

56 "It therefore is first necessary to ascertain whether Congress intended by the words 'terms, conditions, or limitation,' to empower us to include self-executing forfeiture provisions in certificates in view of the provisions contained in section 212 (a). This section reads in part as follows:

"Certificates * * * shall be effective from the date specified therein, and shall remain in effect until suspended or *terminated as herein provided*." [Italics ours.]

After quoting further from Section 212 (a), the Commission

held that it could not terminate a certificate or rights thereunder by means of "terms and conditions" and said:

"It will be observed that the above section provides only one method for terminating a certificate, and that is by revoking it." The Commission then held that under the Act a certificate once issued and effective may be revoked and the rights granted thereby terminated only for the specific causes for revocation stated in the statute and only in accordance with the procedure therein provided. Section 212 of Part II provides that except upon the application of the holder, himself, the Commission may revoke a certificate only

"for willful failure to comply with any provision of this part or with any lawful order, rule, or regulation of the Commission promulgated thereunder, or with any term, condition, or limitation of such certificate, permit, or license."

And it is further provided that a certificate may not be revoked other than on the application of the holder unless the holder has failed for a period of not less than thirty days to obey an order of the Commission directing the carrier to mend its ways.

This feature of the decision in the Smith Bros. case points to an important distinction between the provisions of Part II and those of Part III, with which we are here concerned. This distinction is that Part III, in contrast with Part II, contains no provision whatever for revoking a certificate once issued and effective. If, as the Commission held in the Smith Bros. case, a certificate issued under Part II may not be revoked or the rights therein granted withdrawn except for the specific and limited causes set forth in the statute, and in accordance with the procedure specified, it follows that a certificate under Part III when it has once become effective, remains inviolable and that no rights thereunder may be taken away by the Commission, provided, of course, there was no fraud in the application for or procurement of the certificate. This is so whether or not the Commission changes its mind as to the conclusions which it should have reached upon the facts shown.

The decision in the Smith Bros. case has been followed in numerous other cases and has been held to extend to a change in a certificate which would alter the nature of or partially revoke the rights granted even though on reconsideration the Commission might be inclined to reach a different conclusion from that originally announced and reflected in the certificate. In Manhattan Coach Lines, Inc. v. Adirondack Transit Lines, Inc., 42 M. C. C. 123, it was proposed that a certificate which had been granted and had become effective should be modified because the authorization defined in the certificate was too broad. As Division 5 said (p. 125), all of the questions presented

"involve in some degree the question of our power to revoke or modify, in such a manner as to restrict an operating right granted in an effective certificate."

Citing the Smith Bros. case, Division 5 held (p. 126):

"*The principle so announced is controlling here where changes amounting to partial revocation are sought.* A decision having been reached in the proceeding on defendant's 'grandfather' clause application, and *a certificate having been issued and allowed*
57 *to become final and effective without exception by interested persons, is conclusive*, in the absence of fraud, misrepresentation, or mechanical error, *as to the 'grandfather' rights of defendant as against belated claims* of competitors *that too much was granted. Any other rule would contribute an intolerable uncertainty to the finality of any right granted.*" [Italics ours.]

We direct attention particularly to the last sentence which has been emphasized. There would be nothing more discouraging to the maritime industry or more in conflict with the declared purpose of Congress that there should be established and maintained a strong merchant marine in the coastwise trade than that a certificate which has been granted and pursuant to which a carrier has conducted its business should be subject at any time to modification or withdrawal so as to limit or change the rights which the carrier supposed that it had. This is especially true in a case such as the present where action has been taken in reliance upon the terms of the certificate issued.

It is not as though carriers to whom certificates have been granted operate as mere licensees of the Commission under licenses which may be withdrawn or modified by the Commission at any time. The operating rights which, by reason of the statute, accrue to a carrier which has complied with the formal requirements for the issuance to it of a certificate and to which a certificate has been issued which has become effective, are property rights protected by the Constitution, of which the carrier may not be deprived merely because the Commission may change its views as to the form and scope of the certificate which it should issue. Frost v. Corporation Commission, 278 U. S. 515, 519, 520.

We accordingly submit that the Commission's order of January 27, 1944, reopens the case for the consideration of a proposed modification or limitation of the authority granted by the certificate, which modification or limitation is not within the power of the Commission under the statute. Accordingly, there is no purpose in conducting the proceeding called for by the order of reopening, and that order should, therefore, be rescinded.

Wherefore, applicant prays that the Commission's order of January 27, 1944, reopening this proceeding and assigning it for

hearing, as amended by its further order of February 21, 1944, changing the date of the hearing, be vacated and rescinded and that further proceedings pursuant to said order be discontinued.

Applicant further prays that if the Commission shall be in doubt upon the questions raised by this motion, it may set the proceeding for oral argument upon these questions, it may invite more detailed briefs on behalf of applicant and any other water carriers or other parties concerned, and pending its determination thereon may defer further proceedings pursuant to its said order of January 27, 1944.

Respectfully submitted.

PARKER MCCOLLESTER,
LORD, DAY & LORD,
Attorneys for Applicant,
25 Broadway, New York 4, N. Y.

Dated March 23, 1944.

58 *Exhibit L*

BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. W-543

SEATRAIN LINES, INC., COMMON CARRIER APPLICATIONS

AFFIDAVIT

STATE OF NEW YORK,
County of New York, ss:

Graham M. Brush, being duly sworn, deposes and says as follows:

I am President of Seatrain Lines, Inc., the applicant in the above-entitled proceeding. Seatrain Lines, Inc. seasonably filed two applications for the issuance to it of certificates of public convenience and necessity, one application being filed under the provisions of the so-called "grandfather" clause of Section 309 of the Interstate Commerce Act relating to its operations between New York and New Orleans and the other application being under the so-called "interim" clause of that section relating to its operations between New York and Texas City, Texas.

Thereafter a field examiner of the Commission interviewed applicant's officials with respect to the two applications, examined applicant's records, to which he was given access, and was furnished by applicant with all information and supporting data which he requested with respect to applicant's operations.

On or about July 11, 1942, applicant received the report and order of Division 4, dated July 2, 1942. By its said order, which covered the operations to which applicant's two separate applications related, the Commission certified:

"It is hereby certified, That public convenience and necessity require the continuance of operations by Seatrain Lines, Inc., as a common carrier by self-propelled vessels, in interstate or foreign commerce, in the transportation of commodities generally between the ports of New York, N. Y., New Orleans, La., and Texas City, Tex., by way of the Atlantic Ocean and the Gulf of Mexico."

By its terms the said order and certificate took effect on and have been in force and effect from and after August 10, 1942.

The certificate issued by said order was in accordance with the applications, except that (a) applicant's request for authority to carry passengers between New York and New Orleans was denied; (b) each application prayed for a certificate simply "to operate as a common carrier," whereas the certificate authorized operation "as a common carrier by self-propelled vessels"; and (c) the Commission issued a single certificate instead of two separate certificates.

In reliance upon the Commission's order and the certificate thereby granted, Seatrain Lines, Inc. has planned to re-enter the coastwise trade between Atlantic and Gulf ports and resume the operations authorized by the certificate when permitted to do so by the War Shipping Administration and in reliance upon the certificate has made substantial expenditures and commitments and, among other things, has re-acquired title from the United States to four vessels which were formerly engaged in the operations to which the certificate relates. Seatrain Lines, Inc. would not have made these expenditures nor entered into the commitments if it had had reason to believe that the Commission
59 would or could reopen the proceeding upon its applications for the purpose of changing and thereafter change the certificate by including therein any new terms, conditions or limitations designed to have the effect of altering the operating rights of Seatrain Lines, Inc. which accrued to it under the terms of the certificate as issued by the Commission's order of July 2, 1942, such as the terms, conditions or limitations indicated in the Commission's order of January 27, 1944 reopening the proceeding.

(Sgd.) GRAHAM M. BRUSH.

Signed and sworn to before me this 25th day of March 1944.

[SEAL] RAYMOND J. MARTIN, *Notary Public.*

Kings County Clk's No. 57, Reg. No. 57-M-6; Bronx County

Clk's No. 8, Reg. No. 18–M–6; Queens County Clk's No. 79, Reg. No. 28–M–6; N. Y. County Clk's No. 202, Reg. 125–M–6.

Term expires March 30, 1946.

(Sgd.) RAYMOND J. MARTIN,

59–A *Exhibit M*

ORDER

At a General Session of the Interstate Commerce Commission held at its office in Washington, D. C., on the 3rd day of April, A. D. 1944

No. W–543

SEATRAIN LINES, INC., COMMON CARRIER APPLICATIONS

Upon further consideration of the record in the above-entitled proceeding and of motion dated March 23, 1944, filed by applicant for vacation or rescission of the order of Division 4 entered under date January 27, 1944 reopening the proceeding for hearing and requesting that further proceedings pursuant to said order be discontinued;

It is ordered, That the said motion be, and it is hereby, overruled without prejudice to its renewal at the conclusion of the hearing to be held pursuant to said order of reopening.

By the Commission:

[SEAL] W. P. BARTEL, *Secretary.*

60 *Exhibit N*

BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. W–543

SEATRAIN LINES, INC., COMMON CARRIER APPLICATIONS

Petition for Reconsideration of Order Dated April 3, 1944 Overruling Motion or in Lieu Thereof for Postponement of Further Proceedings Pursuant to Order Dated December 18, 1943 Pending Consideration and Determination of Authority of the Commission to Revoke or Modify Operating Rights or Privileges Granted by Certificate Which Has been Issued and Become Effective

Now comes Seatrain Lines, Inc., applicant in the above-entitled proceeding, and respectfully renews its motion dated March 23, 1944, a copy of which is attached to the original hereof, and petitions the Commission that it reconsider its order dated April 3, 1944 overruling said motion, and prays that in aid of such recon-

sideration the Commission may receive briefs within such time as it may fix and may hear oral argument on behalf of applicant and interveners with respect to the jurisdictional question raised by said motion. In the alternative, applicant prays that the Commission may in such other manner as it may deem appropriate, either as a part of this proceeding or as a separate proceeding but before holding hearings in this proceeding for the receipt of evidence, consider and determine whether it has authority to modify a certificate which has been issued and has become effective in such a way as to revoke, alter or restrict any operating rights or privileges granted thereby and may accord an opportunity to applicant and other parties interested to be heard and present briefs and argument upon this jurisdictional question. Applicant further prays that whichever alternative be pursued the Commission may stay further proceedings pursuant to the orders of Division 4 dated, respectively, December 18, 1943 and January 27, 1944 pending action on this petition and pending the determination by it of the jurisdictional question raised thereby.

In support of its petition, applicant respectfully represents as follows:

1. Applicant repeats and restates for the purposes of this petition the statements contained on pages 2 to 6, inclusive, of its motion dated March 23, 1944 under the heading "The Facts."

2. Since August 10, 1942, the date upon which the Commission's order took effect issuing a certificate of convenience and necessity to applicant, Division 4 of the Commission, as various recent decisions indicate, has apparently changed its policy and adopted a policy of attempting by the terms of its orders and the certificates issued to specify the types of service in which a water carrier may engage and to limit the type, size and motive power of vessels and the method of operation which a water carrier may employ in the performance of its transportation service. Whether under Part III of the Act the Commission has authority so to limit or define the operations and service of a water carrier by the terms of the certificate issued to it is a question as to which applicant does not by this petition seek to raise an issue, although it reserves all of its rights with regard thereto if and when the determination of that issue should become pertinent.

3. The change of policy of Division 4 is cited, however,
61 because it was apparently in pursuance thereof that Division 4 by its order dated December 18, 1943 reopened this proceeding for reconsideration and by its further order dated January 27, 1944 directed that the proceeding was reopened for hearing upon the question whether the order and certificate previously issued should not be modified to revoke the authority granted thereby and in lieu thereof to limit applicant's authority to operation only.

"by the 'Seatrain' type of vessels in the transportation of liquid cargoes in bulk; of empty railroad cars, and of property loaded in freight cars received from and delivered to rail carriers and transported without transfer from the cars between the ports * * *." No fraud or misrepresentation in connection with the application or the issuance of the order and certificate dated July 2, 1942 was or could be alleged or suggested.

4. Applicant believes and submits that as a matter of law when an order issuing a certificate has once become effective, and certainly if action has thereafter been taken or expenditures or obligations incurred in reliance thereon, the Commission may not thereafter revoke, alter or restrict the nature of the rights granted thereby and that such rights are in the nature of franchise rights and constitute property of which the holder may not be deprived. Applicant believes, moreover, that if the Commission did have authority to revoke, restrict or alter operating rights under a certificate which has become effective and if shipowners could not act in reliance upon a certificate which has become effective and upon the rights granted thereby, there would be such uncertainty as to property rights affecting the shipping industry that capital would be discouraged from investing in the industry and the declared purpose of Congress that there shall be a strong merchant marine under private ownership would be defeated.

5. Holding the beliefs which have been stated in the previous paragraph, applicant, in order squarely to raise the jurisdictional question involved, filed its motion dated March 23, 1944. But its order of April 3, 1944, the Commission overruled this motion, stating, however, that its action was without prejudice to the renewal of the motion at the conclusion of the hearing called for by the notice which was issued contemporaneously therewith.

6. Presumably the purpose of the proposed hearing is to receive evidence as to whether during the "grandfather" clause period applicant's operations between New York and New Orleans were limited to operations such as described in the proposed amended certificate and as to whether with respect to applicant's application for a certificate authorizing it to engage in transportation between Texas City and New York the public interest and necessity would be served if its operating rights should be limited to the transportation only of the freight and only in the manner and only by vessels intended to be described by the proposed order. If however, as applicant submits the Commission is without power thus to revoke or alter the operating rights previously granted to it, the presentation of such evidence would obviously be superfluous and the holding of a hearing and the attendance of witnesses would impose an unwarranted burden on all concerned and would only tend to confuse the issues and delay a determination of the

important jurisdictional question. It is submitted, therefore, that before compelling applicant to attend a hearing and produce evidence, orderly procedure requires that there should be a determination as to whether the Commission does have the power to revoke, alter, or restrict operating rights which have been issued and acted upon, since obviously if the decision on the question is in the negative this will eliminate the reason for the hearing.

7. Moreover, other coastwise lines, evidently alarmed by the suggestion that the Commission, because of a change in policy on its part and not because of any fraud, misrepresentation, or error as to a material fact, should seek to revoke or alter operating
62 rights which have been issued and have become effective, have petitioned for leave to intervene in this proceeding and be heard upon this issue. These lines, as applicant is informed and believes, are not concerned with the particular facts as to applicant's operations but only with the question of jurisdiction and they desire an early determination on that question.

Wherefore, applicant prays that the Commission may reconsider its order dated April 3, 1944 overruling applicant's motion or, in such other manner as the Commission may deem appropriate, may consider and determine the question whether it has jurisdiction to modify a certificate which has been issued and has become effective for the purpose or with the result of revoking, altering or restricting the operating rights granted thereby; that applicant, interveners and others interested may be afforded an opportunity to present briefs and oral argument with regard to this jurisdictional question, and that pending final determination thereof the Commission may stay and postpone hearings pursuant to the orders of Division 4 dated December 18, 1943 and January 27, 1944. And applicant prays for such other and further relief as in the premises may be proper.

Respectfully submitted.

PARKER MCCOLLESTER,
LORD, DAY & LORD,
Attorneys for Applicant,
25 Broadway, New York 4, N. Y.

Dated April 21, 1944.

63 In United States District Court

Order assembling three-judge Court

Filed June 2, 1945

And now, to wit, this 2nd day of June 1945, it appearing that the above-entitled cause requires a court consisting of three judges, one of whom shall be a circuit judge,

Now, therefore, I, Paul Leahy, United States District Judge

for the District of Delaware, call to my assistance for the hearing and disposition of the above-entitled cause Honorable John Biggs, Jr., a Circuit Judge of the United States for the Third Judicial Circuit, and Honorable Gerald McLaughlin, a Circuit Judge of the United States for the Third Judicial Circuit, and so constitute a court for the hearing and disposition of the above-entitled cause, on July 13, 1945, at 10:30 a. m.

(S) PAUL LEAHY, J.

64 In United States District Court

Answer of the United States of America

Filed June 15, 1945

Now comes the United States of America, one of the defendants in the above-entitled cause, and for answer to the petition or complaint herein answers and says:

1. Defendant admits the allegations of paragraphs 1, 2, 3, 4, 5, 6, 7, 8, and 9 of the complaint.

2. In answer to paragraph 10 of the complaint defendant reserves the right to object to the admission in evidence of the tariffs referred to therein, if said tariffs were not in evidence before the Interstate Commerce Commission (hereinafter referred to as the Commission) in the proceedings which resulted in issuance of the order assailed in the present suit; and to object to the admission of such tariffs as proof of actual transportation service performed by plaintiff or as proof of any fact other than plaintiff's "holding out."

3. Defendant admits the allegations of paragraphs 11 and 12 of the complaint.

4. In answer to paragraph 13 of the complaint defendant denies that the affidavit of plaintiff's vice president therein referred to constituted proof as to the character of the actual trans-
65 portation performed by plaintiff, and alleges that such affidavit was not binding upon the Commission, but that it was the duty of the Commission to determine the facts with reference to plaintiff's operations and that the Commission was free to weigh and evaluate all the evidence of record.

5. Defendant admits the allegations of paragraphs 14, 15, 16, 17, 18, and 19 of the complaint.

6. Defendant is without knowledge or information sufficient to form a belief as to the allegations of paragraphs 20, 21, and 22 of the complaint.

7. Defendant admits the allegations of paragraphs 23, 24, 25, 26, 27, 28, and 29 of the complaint.

8. In answer to paragraph 30 of the complaint defendant admits

that the Commission held a hearing at which plaintiff was at liberty to, but did not, offer any further evidence.

9. Defendant admits the allegations of paragraphs 31 and 32 of the complaint, and for a more particular statement of the matters and things referred to in the said paragraphs respectfully refers the Court to the Commission's report and order of February 6, 1945, attached as Exhibits "B" and "A" to the complaint.

10. Defendant denies the allegations of paragraph 33 of the complaint.

11. Defendant admits the allegations of paragraphs 34, 35, and 36 of the complaint.

12. Defendant admits the allegations of paragraph 37 of the complaint, except that defendant reserves the right to object to the admission in evidence of plaintiff's tariff schedules.

13. Defendant admits the allegations of paragraphs 38, 39, 40, 41, 42, and 43 of the complaint.

14. Defendant is without knowledge or information sufficient to form a belief as to the allegations of paragraphs 44, 45, and 46 of the complaint.

66 15. In answer to paragraph 47 of the complaint, defendant refers to and adopts its answer heretofore made to paragraphs 23 to 32, inclusive.

16. Defendant denies the allegations of paragraphs 48, 49, 50, and 51 of the complaint.

17. Further answering the complaint, defendant alleges that with respect to plaintiff's application for a certificate authorizing continuance of plaintiff's "grandfather" operations, plaintiff was entitled to, and it was the duty of the Commission to issue, a certificate affording plaintiff nothing more than substantial parity between the operations authorized in the certificate and plaintiff's prior bona fide operations; that proof of bona fide operation requires proof of substantial service; that the function of determining authoritatively the scope of plaintiff's substantial operations is entrusted by law to the Commission.

18. Defendant further alleges that the Commission found, upon substantial evidence of record, that the substantial operations of plaintiff were limited to transportation of general commodities moving in railroad cars, as well as of empty railroad cars, and of liquid cargoes in bulk; that the original certificate was improvidently issued on July 2, 1942, effective August 10, 1942, in that its wording did not correspond sufficiently with the actual facts as found regarding plaintiff's operations; that it was the duty of the Commission, in furtherance of the due administration of the applicable regulatory legislation, to issue a certificate in accordance with the true facts as duly found and established by the evidence, and to correct the deficient wording theretofore im-

providently adopted, and to withhold from plaintiff none of the operating authority to which plaintiff had proved itself entitled under the true facts as duly established and found.

19. Defendant further alleges that the said original certificate authorized plaintiff to transport nothing but "general commodities"; that it is a matter of doubt and uncertainty whether
67 the term "general commodities" includes loaded or empty freight cars, such cars being ordinarily regarded as instrumentalities for the transportation of commodities rather than as commodities themselves.

20. Defendant further alleges that due to the peculiar nature of plaintiff's method of operation, however, plaintiff is undoubtedly entitled to a certificate authorizing the transportation of loaded and empty freight cars; that plaintiff is, likewise, entitled to authorization to transport and use such cars, in its operations as a water carrier, for the transportation of other commodities to the extent warranted by its proof and its rights as a carrier derived from agreement with the owners of said cars or otherwise; and that it was the duty of the Commission to correct the certificate improvidently issued, in order to afford plaintiff ample and complete authority to continue, in their full scope, plaintiff's prior bona fide operations.

21. With respect to plaintiff's operations commenced after the "grandfather" date, as to which plaintiff was required to prove public convenience and necessity, defendant further alleges that the Commission is made by law the judge of the public need for such operations; that the Commission found that such operations were required because plaintiff's peculiar method of operation furnishes the public a service superior to that of other available water carriers, whose operations are of the "break" bulk type. Defendant further alleges that the Commission's determination that the public need for plaintiff's operation was limited to service of the same type which plaintiff had conducted in the past was warranted by law and based upon substantial evidence; and that it was the duty of the Commission to amend its improvidently issued certificate in order to bring the terms of the certificate into harmony with the requirements of the public for transportation service as duly ascertained and established by the Commission in the exercise of its statutory jurisdiction and discretion.

22. Defendant further alleges that it would be contrary to the public interest and inconsistent with the due administra-
68 tion of the regulatory legislation established by the laws of the United States, if the Commission were without power to correct its improvidently issued certificate and to issue to plaintiff a certificate amply and completely reflecting the full scope of plaintiff's "grandfather" rights as based upon plaintiff's

substantial operations in the past and the scope of such additional operations as are required by the public convenience and necessity as duly ascertained by the Commission.

23. Defendant further alleges that no provision of law prohibits the Commission from correcting its improvidently issued certificate so that it will conform to the requirements imposed by the public interest and the statutory scheme of regulation established by the laws of the United States.

24. Except as hereinabove expressly admitted, defendant denies each and every allegation in the complaint contained.

Wherefore, defendant prays that the relief prayed for by plaintiff be denied and that the complaint be dismissed.

(S) Edward Dumbauld,
EDWARD DUMBAULD,
Special Assistant to the Attorney General,
Department of Justice,
Washington 25, D. C.

WENDELL BERGE,
Assistant Attorney General.
JOHN J. MORRIS, JR.,
United States Attorney.

69 I certify that copies of the foregoing answer were this day mailed to the following persons: Parker McCollester, Esq., 25 Broadway, New York 4, New York; Wilbur LaRoe, Jr., Esq., Investment Building, Washington 5, D. C.; Edward M. Reidy, Esq., Interstate Commerce Commission, Washington 25, D. C. This 11 day of June 1945.

(S) Edward Dumbauld
EDWARD DUMBAULD.

70 In United States District Court

Intervention of Interstate Commerce Commission

Filed June 22, 1945

To the Honorable the Judges of said Court:

In accordance with the provisions of section 212 of the Judicial Code, 36 Stat. L. 1150 (U. S. Code, Tit. 28, Sec. 45a), providing, in part, "that the Interstate Commerce Commission and any party or parties in interest to the proceeding before the Commission, in which an order or requirement is made, may appear as parties thereto of their own motion and as of right, and be represented by their counsel, in any suit wherein is involved the validity of such order or requirement," we hereby enter the appearance of

the Interstate Commerce Commission as a party defendant, and of ourselves as its counsel, in the above-entitled suit.

(S) DANIEL W. KNOWLTON,
Chief Counsel,

(S) E. M. REIDY,
Assistant Chief Counsel,
For Interstate Commerce Commission.

71 In United States District Court

Answer of Interstate Commerce Commission

Filed June 22, 1945

Now comes the Interstate Commerce Commission, intervening defendant in the above-entitled cause, and for answer to the petition herein, answers and says:

I

The Commission admits the allegations of paragraph 1 of the petition.

II

Answering the allegations of paragraph 2 of the petition, the Commission refers to its report of February 6, 1945, attached to the petition as Exhibit B, for a statement as to plaintiff's operations.

III

Answering the allegations of paragraphs 3 and 4 of the petition, the Commission admits the same, except that it denies that this suit is brought under the general equity jurisdiction of this court.

72 IV

Answering the allegations of paragraph 5 of the petition, the Commission admits that certain statutory provisions are correctly quoted therein.

V

Answering the allegations of paragraphs 6 and 7 of the petition, the Commission admits the same.

VI

Answering the allegations of paragraph 8 of the petition, the Commission avers that in the exercise of its administrative dis-

cretion, it was appropriate for it to dispose of the two applications therein referred to in a single proceeding.

VII

Answering the allegations of paragraph 9 of the petition, the Commission refers to its report, Exhibit B to the petition, for a statement concerning plaintiff's operations, and denies the allegations of this paragraph to the extent they conflict with statements therein contained.

VIII

Answering the allegations of paragraph 10 of the petition, the Commision reserves the right to object to the admission in evidence of the tariffs referred to therein, if said tariffs were not in evidence before the Commission, in the proceedings which resulted in the issuance of the order assailed in the present suit, and further reserves the right to object to the admission of such tariffs as proof of actual transportation service performed by plaintiff, or as proof of any fact other than plaintiff's "holding out."

73

IX

Answering the allegations of paragraphs 11 and 12 of the petition, the Commission admits the same.

X

Answering the allegations of paragraph 13 of the petition, the Commission admits that among the documents submitted to it in support of plaintiff's application, was the affidavit of E. K. Morse, therein referred to, but the Commission denies that this affidavit constituted proof as to the character of the actual transportation performed by plaintiff. The Commission further alleges that it was its duty to determine the facts with reference to plaintiff's operations, and in the performance of this duty it was free to weigh and evaluate all the evidence of record.

XI

Answering the allegations of paragraphs 14 to 17, inclusive, of the petition, the Commission admits the same.

XII

Answering the allegations of paragraph 18 of the petition, the Commission respectfully refers the court to its report and certifi-

cate of July 2, 1942, Exhibits D and C to the petition, for more full and complete information concerning their contents.

XIII

Answering the allegations of paragraph 19 of the petition, the Commission admits that on August 10, 1942, a certificate issued to plaintiff, which is attached to the petition as Exhibit C, to which the Commission respectfully refers the court for more full and complete information as to its contents.

74

XIV

Answering the allegations of paragraphs 20, 21, and 22 of the petition, the Commission avers that it is without knowledge or information sufficient to form a belief as to the truth of such allegations.

XV

Answering the allegations of paragraph 23 of the petition, the Commission admits the issuance by it on December 18, 1943, of an order, a true copy of which is attached to the petition as Exhibit E.

XVI

Answering the allegations of paragraph 24, 25, 26, and 27 of the petition, the Commission admits the same.

XVII

Answering the allegations of paragraphs 28 and 29 of the petition, the Commission admits that the account of the proceedings before it contained in said paragraphs is substantially correct.

XVIII

Answering the allegations of paragraph 30 of the petition, the Commission admits that a hearing was held by it on April 24, 1944, at which plaintiff offered no further evidence, but denies that it was without jurisdiction to revoke or modify the prior certificate.

XIX

Answering the allegations of paragraphs 31 and 32 of the petition, the Commission admits the issuance by it of the report and certificate of February 6, 1945, Exhibits B and A to the

75 petition, to which the Commission respectfully refers the court for its findings and conclusions with respect to plaintiff's operations.

XX

Answering the allegations of paragraph 33 of the petition, the Commission denies the same.

XXI

Answering the allegations of paragraphs 34, 35, and 36 of the petition, the Commission admits the same but refers the court to the application referred to in paragraph 35, for more full and complete information concerning the authority sought.

XXII

Answering the allegations of paragraph 37 of the petition, the Commission admits the same, except that it reserves the right to object to the admission in evidence of plaintiff's tariff schedules for reasons stated in paragraph VIII hereof.

XXIII

Answering the allegations of paragraphs 38 to 41, inclusive of the petiton, the Commission admits the same.

XXIV

Answering the allegations of paragraph 42 of the petition, the Commission respectfully refers the court to its report of July 2, 1942, Exhibit D to the petition, and to its certificate of the same date, Exhibit C to the petition, for more full and complete information concerning the contents thereof.

XXV

Answering the allegations of paragraph 43 of the petition, the Commission admits that a certificate of July 2, 1942, which
76 was issued by a Division of the Commission, consisting of three members, became effective on that day.

XXVI

Answering the allegations of paragraphs 44, 45, and 46 of the petition, the Commission avers that it is without knowledge or information sufficient to form a belief as to the truth of said allegations.

XXVII

Answering the allegations of paragraph 47 of the petition, the Commission refers to and adopts its answer heretofore made to paragraphs 23 to 32, inclusive.

XXVIII

Answering the allegations of paragraphs 48, 49, 50, and 51 of the petition, the Commission denies the same.

XXIX

Answering the allegations of the petition as a whole, the Commission alleges that with respect to plaintiff's application for a certificate authorizing continuance of plaintiff's "grandfather" operations, plaintiff was entitled to, and it was the duty of the Commission to issue, a certificate affording plaintiff nothing more than substantial parity between the operations authorized in the certificate and plaintiff's prior bona fide operations; that proof of bona fide operation requires proof of substantial service; that the function of determining authoritatively the scope of plaintiff's substantial operations is entrusted by law to the Commission.

The Commission further alleges that it found, upon substantial evidence, that the primary operations of the plaintiff were limited to transportation of general commodities moving in
77 railroad cars, as well as of empty railroad cars, and of liquid cargoes in bulk; that the original certificate was improvidently issued on July 2, 1942, effective August 10, 1942, in that its wording did not correspond sufficiently with the actual facts as found regarding plaintiff's operations; that it was the duty of the Commission, in furtherance of the due administration of the applicable regulatory legislation, to issue a certificate in accordance with the true facts as duly found and established by the evidence, and to correct the deficient wording theretofore improvidently adopted, and to withhold from plaintiff none of the operating authority to which plaintiff had proved itself entitled under the true facts as duly established and found.

XXX

Answering the allegations of the petition, the Commission further alleges that the said original certificate authorized plaintiff to transport nothing but "general commodities"; that it is a matter of doubt and uncertainty whether the term "general commodities" includes loaded or empty freight cars, such cars being ordinarily regarded as instrumentalities for the transportation of commodities rather than as commodities themselves, and further alleges that due to the peculiar nature of plaintiff's method

of operation, however, plaintiff is undoubtedly entitled to a certificate authorizing the transportation of loaded and empty freight cars; that plaintiff is, likewise, entitled to authorization to transport and use such cars, in its operations as a water carrier, for the transportation of other commodities to the extent warranted by its proof and its rights as a carrier derived from agreement with the owners of said cars or otherwise; and that it was the duty of the Commission to correct [illegible] certificate improvidently issued, in order to afford plaintiff ample and complete authority to continue, in their full scope, plaintiff's prior bona fide operations.

78 Answering those paragraphs of the petition with respect to plaintiff's operations commenced after the "grandfather" date, as to which plaintiff was required to prove public convenience and necessity, the Commission further alleges that it is made by law the judge of the public need for such operations; that it found that such operations were required because plaintiff's peculiar method of operation furnishes the public a service superior to that of other available water carriers, whose operations are of the "break bulk" type. The Commission further alleges that its determination that the public need for plaintiff's operation was limited to service of the same type which plaintiff had conducted in the past was warranted by law and based upon substantial evidence; and that it was the duty of the Commission to amend its improvidently issued certificate in order to bring the terms of the certificate into harmony with the requirements of the public for transportation service as duly ascertained and established by it in the exercise of its statutory jurisdiction and discretion.

XXXII

Answering the allegations of the petition as a whole, the Commission alleges that it would be contrary to the public interest and inconsistent with the due administration of the regulatory legislation established by the laws of the United States, if the Commission were without power to correct its improvidently issued certificate and to issue to plaintiff a certificate amply and completely reflecting the full scope of plaintiff's "grandfather" rights as based upon plaintiff's substantial operations in the past and the scope of such additional operations as are required by

79 the public convenience and necessity as duly ascertained by the Commission, and further alleges that no provision of law prohibits the Commission from correcting its improvidently issued certificate so that it will conform to the requirements imposed by the public interest and the statutory scheme of regulation established by the laws of the United States.

XXXIII

The Commission denies that its report and certificate of February 6, 1945, is invalid or beyond its authority for any reason or reasons stated in the petition, or for any other reason or reasons.

Except as herein expressly admitted, the Commission denies each and every allegation in the petition.

Wherefore, having fully answered, the Commission prays that the petition be dismissed.

(S) E. M. REIDY,
Assistant Chief Counsel,
For the Interstate Commerce Commission.

(S) DANIEL W. KNOWLTON,
Chief Counsel, Of Counsel.

80 [*Duly sworn to by Claude R. Porter; jurat omitted in printing.*]

81 In United States District Court

[Title omitted.]

Findings of fact and conclusions of law suggested by defendants United States and Interstate Commerce Commission

Filed October 3, 1945

82 The Court adopts the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. By applications filed on May 29, 1941, Seatrain Lines, Inc., sought a certificate of public convenience and necessity under the "grandfather" clause of Part III of the Interstate Commerce Act, section 309 (a), authorizing continuance of operation as a common carrier by water, in interstate or foreign commerce, in
83 the transportation of commodities generally and passengers between New York and New Orleans, La., via the Atlantic Ocean and the Gulf of Mexico; and it also sought a certificate under section 309 (a) and (c) authorizing continuance of an operation (termed an interim operation) instituted between January 1, 1940 and February 1, 1941, as a common carrier by water, in interstate or foreign commerce in the transportation of commodities generally between New York and Texas City, Texas, by way of the Atlantic Ocean and the Gulf of Mexico.

2. In the Seatrain's application under the "grandfather" clause,

Seatrain described its operation as a "regular weekly service (inaugurated in 1932) in each direction between the Port of New York and the Port of New Orleans, via Havana, Cuba, or direct"; it also advised that Seatrain has continued "to operate as above stated." Attached to the application was an affidavit of its official Morse dated May 28, 1941, in which he asked the Commission to refer to its findings in prior cases involving Seatrain.

3. Seatrain's operations have been a source of much litigation before the Commission and the Commission was quite familiar with the unique character of Seatrain. Among the prior proceedings involving Seatrain before the Commission were:

Investigation of Seatrain Lines, Docket No. 25565, with which was also heard a proceeding on the Application of the Missouri Pacific Railroad Company and Texas and Pacific Railway Company under Pragraph 9, 10 and 11 of Section 5 of the Interstate Commerce Act, Docket No. 25546.

84 Seatrain Lines, Inc. v. The Akron, Canton & Youngstown Railway Company et al., Docket No. 25727, in which and in a related case. I. & S. Docket No. 4542, the Commission made three reports, 226 I. C. C. 7 (1938); 243 I. C. C. 199 (1940); 259 I. C. C. 297 (1944).

Hoboken Manufacturers Railroad Company, v. The Akron, Canton & Youngstown Railway Company et al., Docket No. 27630. The Commission's report in this proceeding is published in 234 I. C. C. 114 (1939).

Hoboken Manufacturers Railroad Company v. Abilene & Southern Railway Company et al., Docket No. 25728. The Commission made four reports, 206 I. C. C. 328 (1935); 226 I. C. C. 7 (1938); 237 I. C. C. 97 (1940); 248 I. C. C. 109 (1941).

See also Int. Com. Comm. v. Hoboken Mfrs. R. R. Co., 320 U. S. 368, United States v. Penna. R. R. Co., et al., 323 U. S. 612.

4. An examiner of the Commission conducted a field examination concerning Seatrain's operations and recommended that its "interim" application be granted. Before this examiner was an affidavit of Witness Hodgson, Vice President of Seatrain, in which reference to testimony in prior Commission proceedings was made, and at pp. 4–5 of this affidavit, it was stated:

"As a matter of fact the Commission has itself in numerous proceedings on extensive records so fully investigated the public interest in Seatrain's operations and in the type of transportation service which it affords, and has so definitely found that Seatrain provides a type of transportation which is required by the public interest that its own decisions would seem to afford a controlling precedent here. From the standpoint of the character of the service which Seatrain's facilities and type of vessels make possible

and the transportation economies resulting from its method of operation, its service between Texas City and Hoboken is in practically all respects similar to its service between New Orleans and Hoboken and the findings of the Commission as to the public interest in connection with the latter are equally applicable in connection with the former."

85 5. Without further proceedings, Division 4 of the Commission consisting of three members, issued its report, dated July 2, 1942, wherein the Division found:

"We find that Seatrain Lines, Inc. was in bona fide operation on January 1, 1940, as a common carrier by self-propelled vessels, in interstate or foreign commerce, in the transportation of commodities generally between the ports of New York and New Orleans, by way of the Atlantic Ocean and the Gulf of Mexico; and that such operation has been continued since that date, except for an interruption of service over which applicant had no control.

"We further find that the present and future public convenience and necessity require operation by applicant as a common carrier by self-propelled vessels, in interstate or foreign commerce, in the transportation of commodities generally between the ports of New York and Texas City, by way of the same route; and that applicant is fit, willing, and able to continue the operation.

"We further find that applicant is entitled to a certificate authorizing such operations, subject, however, to general conditions which are necessary to carry out, with respect to continuance of applicant's operations, the requirements of part III of the act and the orders, rules, and regulations of the Commission thereunder. For the reasons given above, that portion of the application seeking authority to transport passengers between New York and New Orleans will be denied."

A certificate issued to become effective on August 10, 1942, the body of which reads as follows:

"Seatrain Lines, Inc. having filed applications under the provisions of section 309 (a) and (c) of the Interstate Commerce Act for a certificate of public convenience and necessity authorizing continuance of its operations as a common carrier by water, a full investigation of the matters and things involved having been made, and said division on the date hereof, having made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

86 "It is hereby certified, That public convenience and necessity require the continuance of operations by Seatrain Lines, Inc., as a common carrier by self-propelled vessels, in interstate or foreign commerce, in the transportation of commodities generally between the ports of New York, N. Y., New Orleans,

La., and Texas City, Tex., by way of the Atlantic Ocean and the Gulf of Mexico.

"It is ordered, That said carrier be, and it is hereby, authorized to perform the service specified above, subject, however, to such terms, conditions, and limitations as are now, or may hereafter be, attached to the exercise of such authority by this Commission.

"It is further ordered, That the holding of this certificate by said carrier be, and it is hereby conditioned upon the exercise of the authority specified above, and upon compliance by said carrier with the requirements of the Interstate Commerce Act and the orders, rules, and regulations of the Commission thereunder.

"It is further ordered, That the portion of the application seeking authority to transport passengers between New York and New Orleans be, and it is hereby, denied.

"And it is further ordered, That this certificate and order shall take effect and be in force from and after August 10, 1942.

"By the Commission, division 4."

6. About 18 months later, on December 18, 1943, the Commission, on its own motion, reopened the case for reconsideration, and by another order, dated January 27, 1944, it was provided:

"It is ordered, That the said proceeding be, and it is hereby reopened for hearing upon the question of whether or not the said findings and certificate and order of July 2, 1942 should be modified so as to authorize applicant to continue to operate
87 in service in which it was engaged, except for interruptions beyond its control, namely, as a common carrier by the 'Seatrain' type of vessels in the transportation of liquid cargoes in bulk; of empty railroad cars, and of property loaded in freight cars received from and delivered to rail carriers and transported without transfer from the freight cars between the ports above mentioned.

"And it is further ordered, That this proceeding be, and it is hereby assigned for hearing at the offices of the Commission in Washington, D. C., at 9:30 A. M. on February 28, 1944, before Commissioner Porter and Examiner Copenhafer."

7. A motion for vacation and rescission of the reopening order was filed by Seatrain on March 24, 1944, and renewed at the hearing of March 27, 1944. At the hearing on March 27, 1944, Mr. McCollester, counsel for Seatrain, stated:

"I am directed by my client to inform the Commission that until our motion is passed upon, and if the Commission wishes argument on it we are, of course, prepared to argue it more fully; but until our motion is acted upon, we are not prepared to go forward with any evidence.

"Commr. PORTER. Well, I will overrule the motion. Of course,

you know without my advising you at all, you have of course a perfect right of appeal to the entire Commission, but at the same time I will overrule the motion."

8. No evidence was introduced at the March 27, 1944 hearing for the reasons stated but the motion for vacation of the reopening order was presented to the entire Commission and denied on April 3, 1944, "without prejudice to its renewal at the conclusion of the hearing to be held pursuant to said order of reopening."

88 9. Following the filing of petitions for intervention, which were granted, by the Ocean Steamship Company of Savannah, Agwilines, Inc., Eastern Steamship Company and the Bull Steamship Lines, the matter came on for further hearing before Commissioner Porter on April 24, 1944.

At this rehearing, Mr. McCollester said:

"Mr. McCollester. Mr. Commissioner, we have no evidence to offer. Our application was filed, the supporting data was presented in support of the two applications.

"The certificates have been issued and have been in effect for a year and a half or more, and therefore, we do not conceive that there is any question of fact that can now be before the Commission in regard to them, and, consequently, we have no evidence."

10. After this declination to produce evidence, Commissioner Porter stated on the record the matters the Commission would have before it in its consideration of the case, whereupon counsel for Seatrain said:

"Mr. McCollester. I thank Your Honor for bringing those matters to our attention. If I correctly understand, all of the material to which Your Honor has referred, is material which was presented in connection with the applications considered by the Commission in issuing its order of July 2, 1942, which contains certificate and was the material upon which that certificate was based.

"If that clearly appears, of course, we, ourselves, would want that. We want to have that clearly understood. The only objection we would have to the consideration by the Commission at this time, or the receipt for purposes of consideration of any evidence or material of any sort in the nature of factual information which was not before the Commission and was not considered by it in issuing the certificate."

89 11. The entire Commission on May 8, 1944, by order, affirmed its earlier action overruling Seatrain's application to dismiss the proceedings for lack of jurisdiction in the Commission to proceed. The case was fully argued before the entire Com-

mission on July 21, 1944, at which time Seatrain's counsel stated his position as follows:

"Commr. PORTER. Well, your point briefly is that this Commission when it once issues a certificate that that ends it and that it loses its power to change, alter, or modify it in any respect whatsoever? Isn't that your motion?

"Mr. MCCOLLESTER. Yes, Mr. Commissioner, if there is no fraud or misrepresentation and if there is full disclosure of the facts and if action has been taken by the applicant in reliance upon the rights granted."

12. On February 6, 1945, the Commission decided the case, three Commissioners dissenting and one Commissioner not participating. This report is attached to the petition as Exhibit B, and in it the Commission made the following findings and conclusions:

"Upon reconsideration and hearing we find that the following facts among others have been established:

"1. Applicant was engaged on and since January 1, 1940, except for interruptions beyond its control, in the operation of self-propelled vessels designed for the transportation of (1) property, when loaded in railroad cars, (2) empty railroad cars, and (3) liquid cargoes in bulk.

"2. Applicant's vessels have all been taken over by the United States Maritime Commission and applicant is not now in operation and had not operated for several months prior to the date on which the certificate was issued by division 4.

"3. Applicant was engaged on January 1, 1940, and continuously since, except for interruptions beyond its control, in the transportation by water, by self-propelled vessels, in interstate or foreign commerce, of liquid cargoes in bulk; of empty railroad cars, and of property loaded in railroad cars received from and delivered to rail carriers and transported without transfer from railroad cars, between the ports of New York and New Orleans by way of the Atlantic Ocean and the Gulf of Mexico.

"4. Applicant is fit, willing, and able to continue operations instituted after January 1, 1940, between New York and Texas City, in the transportation by water, by self-propelled vessels, in interstate or foreign commerce, of liquid cargoes in bulk; of empty railroad cars, and of property loaded in railroad cars received from and delivered to rail carriers and transported without tansfer from raiload cars, which operations are required by public convenience and necessity.

"5. Applicant seasonably filed applications for authority to continue the operations described in paragraphs 3 and 4.

"6. Applicant has not engaged in transportation of property in so-called 'break-bulk' service, but has confined its operations exclusively to transportation of property loaded in railroad cars, of empty railroad cars, and of liquid cargoes in bulk in special tanks.

"7. Applicant's operations, because of the special type and nature, have been recognized as superior to, and differing from those performed by the break-bulk lines.

"8. The certificate now in effect by inadvertence erroneously describes the operations in which applicant was engaged on and since the 'grandfather' date and during the interim period.

CONCLUSIONS

"Upon hearing and reconsideration, we conclude that Seatrain Lines, Inc., is entitled to a certificate authorizing it to continue operations as a common carrier by water, by self-propelled vessels, in interstate or foreign commerce, in the transportation of liquid cargoes in bulk; of empty railroad cars, and of property loaded in railroad cars received from and delivered to rail carriers, and transported without transfer from the railroad cars, between the ports of New York, New Orleans, and Texas City by way of the Atlantic Ocean and the Gulf of Mexico; subject, however,
91 to general conditions which are necessary to carry out, with respect to the continuance of applicant's operations, the requirements of part III of the act and the orders, rules, and regulations of the Commissioner thereunder. In other respects the findings and conclusions of the prior report are affirmed.

"The certificate and order heretofore entered in this proceeding will be superseded and cancelled, and a corrected certificate and order will be issued to conform to the record, and our findings herein."

13. In its report of February 6, 1945, the Commission, in answer to the contention that considerable expense had been incurred by plaintiff on the strength of the decision of Division 4, stated that although the proceeding had been twice set for hearing, no evidence was offered by plaintiff, consequently it found that "The record therefore contains no specific showing in that respect."

14. On the same date as it issued its report, February 6, 1945, the Commission entered the following corrected certificate and order:

"Further consideration having been had of the record in this proceeding, a hearing having been held, and the Commission on the date hereof having made and filed a report on reconsideration containing its findings of fact and conclusions thereon, which re-

port, together with the prior report of July 2, 1942, is hereby referred to and made a part hereof:

"It is hereby certified, That public convenience and necessity require the continuance of operation by Seatrain Lines, Inc., as a common carrier by self-propelled vessels, in interstate or foreign commerce, in the transportation of liquid cargoes in bulk; of empty railroad cars; and of property loaded in railroad cars received from and delivered to rail carriers and transported without transfer from railroad cars between the ports of New York, N. Y., New Orlens, La., and Texas City, Tex., by way of the Atlantic Ocean and the Gulf of Mexico:

92 "It is ordered, That said carrier be, and it is hereby, authorized to perform the service specified above, subject, however, to such terms, conditions, and limitations as are now, or may hereafter be, attached to the exercise of such authority by this Commission.

"It is further ordered, That the holding of this certificate by said carrier be, and it is hereby, conditioned upon the exercise of the authority specified above, and upon compliance by said carrier with the requirements of the Interstate Commerce Act and the orders, rules, and regulations of the Commission thereunder.

"It is further ordered, That the portion of the application seeking authority to transport passengers between New York and New Orleans be, and it is hereby, denied.

"And it is further ordered, That the certificate and order issued on July 2, 1942, be, and it is hereby, superseded and cancelled as of the effective date of this corrected certificate and order; and that this corrected certificate and order shall take effect and be in force from and after May 21, 1945."

15. The effective date of the Commission's order and certificate, referred to in paragraph 14 and shown to be May 21, 1945, has been voluntarily postponed until October 21, 1945.

16. On May 12, 1945, petitioner Seatrain filed its bill of complaint in this court alleging that the Commission's report and certificate of February 6, 1945, were beyond the authority of the Commission.

17. The United States filed an answer, denying the material allegations of the complaint; the Commission intervened in support of the validity of its order, and filed an answer to the same effect.

93 18. The proceeding was orally argued before a three-judge court, convened pursuant to statute, on July 20, 1945, and has been submitted to the court on briefs and reply briefs

as well as oral argument. The entire record before the Commission was introduced in court at that time.

19. At the hearing before this court on July 20, 1945, petitioner, over objections of defendants, was permitted, subject to later ruling by the court on the objection, to introduce evidence de novo in court, and the matter is now before this court for determination.

Based upon the foregoing findings of fact, the court enters the following

CONCLUSIONS OF LAW

1. The court has jurisdiction of the parties and of the subject-matter of this suit.

2. The testimony of Witness Brush received, subject to later ruling on defendants' objection to its receipt, by this court on July 20, 1945, is rejected and stricken from the record.

3. The trial of a case on review of an order of the Interstate Commerce Commission is not a trial de novo, and save in circumstances not existing here, the court is confined to the record introduced before the Commission in passing upon the validity of its order.

4. It is not in accord with equitable principles to be applied by this court for a party to decline to introduce evidence
94 before the Interstate Commerce Commission, and then endeavor to put such evidence before the court.

5. The report and certificate of Division 4, consisting of three members, issued July 2, 1942, conferred no vested rights on plaintiff, because under applicable law, decisions of a Division are subject to review and reconsideration by the entire Commission, consisting of 11 members, and not until a proceeding has been passed upon by the entire Commission, has a party exhausted its administrative remedies.

6. The report and certificate of Division 4, issued on July 2, 1942, contained an express provision that it might later be modified or changed by the Commission, which read as follows:

"It is ordered, That said carrier be, and it is hereby, authorized to perform the service specified above, subject, however, to such terms, conditions, and limitations, as are now, or may hereafter be, attached to the exercise of such authority by this Commission."

7. The Commission's report and certificate of February 6, 1945, were within the statutory authority of the Commission to issue, and its conclusions therein are clearly justified by section 309 (d) of Part III of the Interstate Commerce Act, which confers on the Commission authority to promulgate "terms and conditions"

from time to time after the issuance of such certificate, and other sections of the Act, including section 315 of Part III.

8. The findings of the Commission contained in its report and certificate of February 6, 1945, are clearly sufficient to sustain its order, and such findings are supported by substantial evidence.

95 9. Petitioner, having declined to introduce evidence to the Commission, is not entitled to claim that the order of the Commission is unsupported by or contrary to the evidence.

10. The evidence that the Commission did have before it is clearly substantial in character and sufficient to support its order of February 6, 1945. The weight of evidence and the wisdom of the Commission's action are for it, not the courts.

11. The Commission's report and certificate of February 6, 1945, are sustained in all respects.

12. The complaint is dismissed at petitioner's costs.

Respectfully submited.

EDWARD DUMBAULD,
Special Assistant to the Attorney General,
For the United States.
EDWARD M. REIDY,
Assistant Chief Counsel,
For the Interstate Commerce Commission.

96 In United States District Court

[Title omitted.]

Findings of fact and conclusions of law requested by plaintiff

Filed October 3, 1945

REQUESTED FINDINGS OF FACT

1. Plaintiff filed seasonably with the Commission two separate applications: (1) an application for a certificate covering plaintiff's New York-New Orleans operation, based on "grandfather" rights; and (2) a separate application, based not on grandfather rights, but on a showing of public convenience and necessity, for plaintiff's proposed New York-Texas City operation (Exhibit 1).

2. A certificate was issued July 2, 1942, which, admittedly, was identical in form with similar certificates issued to plaintiff's common carrier competitors (Dumbauld, Rec. p. 122).

3. In a case decided less than a month prior to the "corrected certificate" herein the Commission acted favorably upon an application of the Newtex Line for a certificate from New York to

Houston, Texas. Texas City is only a few miles from Houston, and the Newtex Line will parallel Seatrain's line all the way from New York to Texas City. The Newtex Line owned no vessel at all and claimed no grandfather rights (260 I. C. C. 418). The Commission made no findings as to the service methods which Newtex might employ. It withheld actual issuance of the certificate until Newtex acquired "a vessel." On September 21, 1945, long after revoking plaintiff's certificate, the Commission issued to Newtex a certificate which recites that Newtex "has purchased a vessel" and the certificate was accordingly issued without any restrictions as to service methods, the certificate being in form identical with that originally issued to plaintiff. (For the convenience of the Court, a certified copy of the Newtex certificate is attached hereto as an appendix.)

4. Neither in plaintiff's original certificate nor in any issued to plaintiff's competitors based either on grandfather rights or on public convenience and necessity did the Commission specify the types of containers to be employed, or the types of persons with whom freight might be interchanged, or the type of facilities which the common carrier by water might employ in the terminal receipt and delivery of freight, or impose any conditions as to any service methods by which the certificated carrier would conduct its common carrier operations. (Exhibit C to petition; Dumbauld, Rec. p. 122; Newtex certificate, appendix hereto.)

5. At no time prior to the granting of the certificate to plaintiff July 2, 1942, did the Commission ask, either in the conventional forms prescribed by it for certificate applications or in its requests for additional information, that plaintiff supply information as to the type of its ships, its terminal facilities or methods, the type of containers used, the method or extent of transfer of freight to or from cars, or as to any of the service methods by which plaintiff conducted or proposed to conduct its common carrier operations (Exhibit 1).

6. Plaintiff urged the Commission to adjudicate its two applications separately and to make separate findings in view of the different laws and principles applicable to (a) applications based on grandfather rights; (b) applications based on public convenience and necessity; but the Commission failed to make such separate findings and issued a single certificate applicable to both operations.

AS TO THE NEW YORK-TEXAS CITY APPLICATION

7. Plaintiff began its New York- Texas City operation in May 1940, more than four months too late for grandfather rights, and it was engaged in such operation on February 1, 1941.[1] It filed its

[1] This being the extended date fixed by the Commission under the statute.

Texas City application on or about May 28, 1941, for a proposed service based on public convenience and necessity as distinguished from grandfather rights.

8. Plaintiff's application was duly served on plaintiff's known common carrier competitors, including Pan-Atlantic Steamship Corporation, Southern Steamship Company, Southern Pacific Company (Southern Pacific Steamship Lines "Morgan Lines"), The Bull Steamship Line (Paragraph 35 of petition, admission in paragraph XXI of Commission's answer).

9. In accordance with the Commission's regulations and instructions applicant filled out the customary application forms prescribed by the Commission for use in certificate cases, submitting as part of its said application various supporting documents, including affidavit of plaintiff's vice president describing the operation and referring to plaintiff's tariff schedules duly published and filed with the Commission naming the rates, rules and regulations in connection with the transportation of freight between New York and Texas City. The Commission's attention was called to its findings only a month before in Missouri Pac. R. Co. & T. & P. Ry. Co., Service by Water, 245 I. C. C. 143.[1] Plaintiff complied with requests from the Commission for supplemental information, and in addition the Commission sent an investigator to plaintiff's office to obtain additional information, which was furnished, and to examne plaintiff's records (Paragraph 37 of petition, admitted in paragraph XXII of Commission's answer).

10. No protest of any kind having been received from any of plaintiff's competitors or from any other person, the Commission did not hold a public hearing but adjudicated the matter on the basis of the aforesaid data, its report being dated July 2, 1942, and pursuant thereto issued its certificate of the same date (Exhibit D to the petition herein) wherein it certified:

"It is hereby certified, That public convenience and necessity require the continuance of operations by Seatrain Lines, Inc., as a common carrier by self-propelled vessels, in interstate or foreign commerce, in the transportation of commodities generally between the ports of New York, N. Y., and New Orleans, La., and Texas City, Tex., by way of the Atlantic Ocean and the Gulf of Mexico.

"It is ordered, That said carrier be, and it is hereby, authorized to perform the service specified above, subject, however, to such terms, conditions, and limitations as are now, or may hereafter be, attached to the exercise of such authority by this Commission."

11. After said certificate had been in effect for nearly a year and a half, the Commission through Division 4, without any complaint

[1] The Commission decided in the case cited that continued ownership by the applicant railroads of minority stock in Seatrain Lines, Inc., would not prevent Seatrain from being operated in the interest of the public

or protest from any person, entered its order dated December 18, 1943, copy of which is attached to the petition as Exhibit E, reopening the proceedings for reconsideration.

12. On January 3, 1944, plaintiff received from a bureau of the Commission a letter, copy of which is attached as Exhibit F to the petition herein, together with a draft of a proposed amended order embodying amended certificates, copies of which are attached to the petition as Exhibits G and H, with the request that plaintiff advise the Commission as to said proposals.

13. Under the date of January 20, 1944, counsel for plaintiff, in response to the request, forwarded to the Assistant Director of the Commission's Bureau of Water Carriers and Freight Forwarders a letter, a copy of which is attached to the petition as Exhibit I, pointing out various errors in and objections to the proposed new certificate (Admitted in paragraph XVI of Answer).

14. On or about January 27, 1944, Division 4 of the Commission issued a further order dated that day, a copy of which is annexed to the petition as Exhibit J, by which the Commission ordered that the proceeding upon plaintiff's original applications be reopened—

"for hearing upon the question of whether or not the said findings and certificate and order of July 2, 1942, should be modified so as to authorize applicant to continue to operate in service in which it was engaged, except for interruptions beyond its control, namely, as a common carrier by the 'Seatrain' type of vessels in the transportation of liquid cargoes in bulk; of empty railroad cars,
97 and of property loaded in freight cars received from and delivered to rail carriers and transported without transfer from the freight cars between the ports above mentioned" (New York, New Orleans and Texas City).

15. On or about March 23, 1944, plaintiff filed with the Commission a motion, a copy of which is attached to the petition as Exhibit K, whereby it prayed that the Commission vacate and rescind its order reopening the proceeding and assigning it for hearing, on the ground that plaintiff had incurred substantial expense and had made important commitments pursuant to and in reliance upon the certificate as issued by the Commission July 2, 1942, that the Commission was without authority to cancel, alter or amend said certificate so as to revoke or restrict the rights, authorization and privileges held by plaintiff thereunder, and that any attempt so to do would take plaintiff's property without due process of law (Paragraph 27 of petition, admitted in paragraph XVI of answer).

16. Prior to the aforesaid hearing there was filed with the Commission as part of the record in the proceeding an affidavit of Graham M. Brush, President of plaintiff, reciting, among other things, that plaintiff, in reliance on the certificate, had reacquired

title to four vessels and made other expenditures and commitments (Exhibit L to the petition herein).

17. By order dated April 3, 1944, the Commission overruled plaintiff's motion (Exhibit M to the petition herein).

18. On or about April 21, 1944, plaintiff filed with the Commission a petition, a copy of which is attached to the petition as Exhibit N, whereby it prayer the Commission to reconsider its said order of April 3, 1944, overruling plaintiff's motion of March 23, 1944 (Paragraph 29 of petition, admitting in paragraph XVII of answer).

19. The Commission by notice dated April 8, 1944, assigned the proceeding, pursuant to its order for reopening, for hearing on April 24, 1944. At the time of such hearing counsel for plaintiff appeared specially for the purpose of again challenging the jurisdiction of the Commission to revoke the authorization and privileges granted by a certificate which had been issued and had taken effect and in reliance upon which plaintiff had incurred expense and undertaken obligations. Counsel for plaintiff also advised the Commission that plaintiff did not concede and would challenge the Commission's jurisdiction to specify in a certificate the manner in which a water carrier shall conduct its service (Paragraph 30 of petition, admitted in paragraph XVIII of answer).

20. Plaintiff offered no evidence at the hearing because it wished to challenge the Commission's power to do what it proposed to do.

21. The case was briefed and argued and on February 6, 1945, the Commission, with two of the eleven members not voting, with one concurring in part and with Commissioners Lee, Alldredge and Patterson dissenting, announced its decision and issued its report, Exhibit B to the petition. At the same time and pursuant to said decision, the Commission issued its "orders," Exhibit A to the petition, whereby it purported to cancel and supersede the certificate theretofore issued to plaintiff by it July 2, 1942, Exhibit C, authorizing plaintiff to operate

"as a common carrier by self-propelled vessels, in interstate or foreign commerce, in the transportation of commodities generally"

and purported to limit the service which plaintiff would be authorized to perform to service

"as a common carrier by self-propelled vessels, in interstate or foreign commerce, in the transportation of liquid cargoes in bulk; of empty railroad cars; and of property loaded in railroad cars received from and delivered to rail carriers and transported without transfer from railroad cars."

The "corrected order" is reproduced in full in Appendix to plaintiff's main brief herein.

22. The period of time which elapsed between the issuance of the certificate to plaintiff (July 2, 1942) and the date of the "corrected certificate" (February 6, 1945) was more than two-and-one-half years.

23. There was no finding made, and no evidence showing or tending to show, that as to plaintiff's proposed service between New York and Texas City that the public convenience and necessity would be served by requiring plaintiff to handle in railroad cars all its freight, including freight trucked to and from its own stations, or by requiring plaintiff to receive such cars from railroads and deliver them to railroads; or by requiring plaintiff to handle traffic "without transfer from railroad cars" (Report of Commission, also Exhibit 1).

AS TO PLAINTIFF'S NEW YORK–NEW ORLEANS OPERATION

24. Plaintiff was in operation as a common carrier of commodities generally between New York and New Orleans since October 1932, and continuously thereafter except for interuption beyond its control (Reports of Commission herein).

25. Plaintiff filed its application for a grandfather certificate within the time limit specified in the Act and in accordance with all the Commission's rules, supplying all data called for by the Commission (Paragraph 2 of Petition, paragraph IX of Commission's Answer).

26. The subsequent procedural steps in connection with the New York-New Orleans application were similar to those previously recited herein with respect to the New York-Texas City application (Paragraphs 13 to 32 of Petition, paragraphs X to XIX of Commission's Answer).

AS TO PLAINTIFF'S STATIONS, TARIFFS, ETC.

27. Plaintiff publishes and files its tariffs applicable not only to through traffic interchanged with the railroads, but as to its other traffic, including local port-to-port traffic interchanged with other steamship lines, and traffic having origin or destination at one of its ports and origin or destination in the interior (Exhibit 2 herein).

28. Seatrain maintains its own freight stations in Manhattan and Brooklyn, which are not reached by rail (Witness Brush, Rec. p. 92; Seatrain tariffs, Ex. 2; See p. 39 of plaintiff's main brief).

29. Seatrain publishes tariffs under which it holds itself out to receive and deliver New York freight at its Manhattan station, not reached by rail, and plaintiff's tariff rates on such traffic apply to and from its Manhattan station except where the tariff

specifically provides otherwise (Tariffs, Exhibit 2, page 39 of plaintiff's main brief).

30. Plaintiff cannot serve even its own stations under the limitations of the "corrected order" for the reason that such stations are not reached by rail, and if they were so reached, the traffic could not be handled without transfer (Rec. 92–93).

31. While in the past, because of limited terminal and lighterage berth facilities, particularly at Hoboken, plaintiff has for its own operating convenience loaded lighterage and truck freight into railroad cars, plaintiff has recently acquired at Edgewater, N. J., a new terminal where the former handicaps will be overcome and where economical facilities will be made available for the direct handling of plaintiff's traffic which requires transfer or which is not received from and delivered to a railroad at both ends of its line (Rec. 92–93).

32. It is not economic in most instances to handle in railroad cars port-to-port traffic or through traffic having origin or destination at a port. The extra use of railroad cars in the terminal operation can be avoided where sufficient facilities are available, as they will be at the New Edgewater terminal (Rec. 92–93, 100–101).

33. Plaintiff's lighterage traffic is not regarded by the Commission as railroad interchange traffic, even where because of inadequate terminals, as at Hoboken, the traffic is loaded into railroad cars, or from railroad cars, because the Commission has held that Seatrain's lighterage traffic is not interchanged with Hoboken Manufacturers Railroad, the only railroad with which Seatrain has rail connections at Hoboken (Hoboken Divisions case, 234 I. C. C. 114, 142).

34. The Commission admits that plaintiff has always handled local port-to-port traffic, including its own freight station (truck) traffic and lighterage traffic (p. 14 of Commission's reply brief).

35. The Commission's admission (p. 14 of its reply brief) that local port-to-port traffic, including lighterage and truck traffic, can be handled under the "corrected certificate" by using freight cars and employing the loading and unloading devices of Seatrain, overlooks the fact that the handling of such traffic is prohibited by another restriction in the "corrected order," namely, the restriction which requires handling "without transfer from railroad cars."

36. The same restrictions requiring plaintiff to handle traffic in railroad cars and without transfer from railroad cars would likewise prohibit the handling of motor truck traffic whether originated locally at a port or in the interior, and whether destined to a port or to the interior (Rec. p. 92).

37. The new property recently acquired at Edgewater was not

acquired for the handling of overhead or through business to be handled without transfer but was acquired for the express purpose of handling all of plaintiff's other traffic, including lighterage and truck traffic (Rec. p. 101).

98 38. There is not enough of the overhead or through traffic handled without transfer to give Seatrain a living (Rec. p. 110).

39. With its heavy lift equipment Seatrain has handled and can handle freight too large and too heavy for the railroads to handle and so large that the articles can be handled only by barge or otherwise floated beyond the end of Seatrain's line (Letter in record from M. W. Kellogg Company, set forth at p. 19 of plaintiff's main brief).

AS TO PLAINTIFF'S RELIANCE UPON THE ORIGINAL CERTIFICATE

40. Plaintiff made, after the issuance of the Certificate July 2, 1942, and before the receipt of any information or intimation that the Commission intended to modify the Certificate (Rec. 149–150) very substantial expenditures and investments in reliance on the said Certificate, as follows:

(a) Plaintiff continued to maintain its Texas City terminal, not needed for wartime operation, at a cost of over $30,000 annually. Other costs of maintaining plaintiff's organization as a common carrier by water have brought the total to more than $140,000 a year (Rec. pp. 86–87).

(b) Plaintiff has reacquired from the government the title to four vessels originally costing $7,700,000. In lieu of the government's obligation to restore the vessels to the original condition (they having been altered for war uses, two of them extensively) plaintiff agreed to accept a maximum of $200,000 per vessel for reconditioning which is far less than the actual cost, as to two of the vessels, for making them suitable for transporting freight under the restrictions of the "corrected certificate," with the result that the total loss in the reconversion of the vessels will be $2,100,000 (Rec. pp. 82–85).

(c) Plaintiff acquired valuable terminal property at Edgewater, N. J., at a cost of approximately $200,000, solely for the handling of its traffic other than through traffic moving by rail between two points both of which are located in the interior (Rec. pp. 100–101).

41. Plaintiff reacquired the aforesaid vessels from the government only because it held the Certificate of July 2, 1942 (Witness Brush, p. 83).

42. The contract for the acquisition of the Edgewater terminal property was consummated three days before plaintiff received

its first intimation, in the form of a letter from a bureau of the Commission, that the Commission intended to revoke the Certificate and withdraw the greater part of the franchise rights (Rec. pp. 149–150).

43. Under the restrictions in the "corrected certificate" plaintiff would be precluded from handling 75 percent of its normal business because under the restrictions plaintiff could not handle its port-to-port traffic, its lighterage traffic (nearly 10 percent of the total),[1] traffic transferred at Hoboken alone (from 5 to 10 percent),[2] freight station traffic and traffic originating in or destined to the interior but not originated or delivered by a railroad, and traffic interchanged with other steamship lines, none of which classes of traffic plaintiff could deliver to or receive from a railroad in a railroad car unless a railroad were employed as an extra and unnecessary terminal agent, and even then such traffic could not be handled "without transfer" (Rec. pp. 102–103).

44. The change in the certificate means so much to plaintiff that two of its ships have been offered for sale because of the threatened limitation in the certificate. "There is only one way to save my company and that is to liquidate in part" (Witness Brush, Rec. p. 85).

Requested Conclusions of Law

As to the legal effect of the "corrected certificate" in altering the status and circumscribing the operations of plaintiff

1. Plaintiff is and has been for years a common carrier by water, and has been so found by the Commission. (Investigation of Seatrain Lines, Inc., 195 I. C. C. 215.)

2. The government has not contended, and does not contend here, that plaintiff should be limited to the handling of particular commodities. Plaintiff is a carrier of general freight, and as such must be regarded as a common carrier by water of commodities generally.[3] Plaintiff applied for and received a Certificate accordingly (Exhibit D to the petition herein).

39 3. Plaintiff is not a car ferry, but is a general common carrier by water as distinguished from a car ferry, and the Commission so held in a proceeding addressed mainly to that distinction. (Investigation of Seatrain Lines, Inc., 195 I. C. C. 215, reaffirmed in a later report in the same investigation, 206 I. C. C. 328, also in Seatrain Lines, Inc. v. Akron, C. & Y. Ry. Co.,

[1] Calculated from Hoboken Divisions case, pp. 117 and 122.
[2] Ibid. p. 124.
[3] "It (Seatrain) can handle all traffic that the all-rail routes can and, because of its lower rates, some that the all-rail routes cannot." Investigation of Seatrain Lines, Inc., 206 I. C. C. 328, 334.

226 I. C. C. 7, 243 I. C. C. 199; Hoboken Mfrs. R. Co. v. Abilene & S. Ry. Co., 237 I. C. C. 97; 248 I. C. C. 109; Missouri Pac. R. Co., and T. & P. Ry. Co., Service by Water, 245 I. C. C. 143.)

4. Since plaintiff has admittedly handled four classes of traffic, to wit, (a) through or overhead traffic interchanged principally with the railroads, as to which plaintiff is a "bridge" carrier; (b) traffic originated in the interior and destined to the port at the far end of plaintiff's line; (c) traffic originating at one of plaintiff's ports but destined for delivery at a point beyond the end of plaintiff's line; (d) local port-to-port business as to which terminal operations are performed by lighter or by motor truck, the Commission correctly issued a grandfather certificate under which all these classes of traffic could be handled, and the Commission is without authority to cancel or withdraw any part of the grant.

5. There is here a substantial revocation as to the franchise rights granted because under the terms of the "corrected certificate" plaintiff is precluded from handling all the foregoing classes of traffic except the class first mentioned, due to the requirement that the traffic be "loaded in railroad cars received and delivered to rail carriers" and by the requirement that the traffic be handled "without transfer from railroad cars" (Rec. 102-103).

6. The legal effect of the "corrected certificate" is to alter the carrier status of plaintiff, converting it from a common carrier by water of commodities generally to a mere "bridge" carrier between railroads.

7. Admitting that the Commission has power to attach conditions and limitations to the exercise of the privileges granted, this cannot be done in such a manner as to withdraw the privileges themselves, because this would clearly conflict with section 309 (a) which contains the mandate that the Commission shall grant "such" certificate, meaning a certificate coextensive with the common carrier status and operations of the grandfather applicant.

8. Even if the Commission has authority to determine and prescribe service methods by which terminal interchange is to be effected, which it does not have, it would be an arbitrary and unreasonable exercise of such power to require railroad cars to be used by a common carrier by water for lighterage interchange or for motor truck interchange.

AS TO THE EXTENT TO WHICH THE AMENDED CERTIFICATE WOULD PREVENT PLAINTIFF FROM CARRYING OUT ITS TARIFF OBLIGATIONS

9. Where, as here, a common carrier published rates in its tariffs applicable to and from a named station (Manhattan) (p. 39 of plaintiff's main brief) the carrier has not only the right but the legal obligation to receive and deliver freight at that station. The

published tariffs have a legislative effect, and they must be observed. Atlantic Coast Line R. Co. v. Delaware & H. R. Corp., 86 Fed. (2d) 721, 1924; Pitzer Transfer Corp. v. Norfolk & W. Ry. Co., 10 Fed. Supp. 436, 438; S. R. Washer Grain Co. v. Missouri Pac. Ry. Co., 15 I. C. C. 147; City of Spokane v. Northern Pac. Ry. Co., 21 I. C. C. 400, order sustained; United States v. Union Pac. R. Co., 234 U. S. 495.

10. Where, as here, a common carrier holds itself out in its published tariffs to perform lighterage on such a commodity as imported crude rubber, such tariffs have a statutory effect and there is a legal obligation on the carrier to carry out its tariff obligation (Cases cited in paragraph 9, supra).

11. Since all crude rubber is imported it would be physically impossible for it to be interchanged "without transfer," if railroad participation is required at both ends of the water haul.

AS TO WHETHER FREIGHT CARS ARE "GOODS"

12. The government's contention that the cars used as containers on plaintiff's ships are themselves "commodities" is without merit. The Seatrain tariffs say nothing about the use of cars, nor are cars mentioned in the bills of lading. Plaintiff's rates apply on the goods tendered by the shipper. Freight cars, when used, are mere transportation facilities. The government's position on this matter here is inconsistent with its position in the Seatrain Car Service Case before this Court wherein the government
100 correctly argued that the cars are facilities, and also inconsistent with the decision of this Court and of the United States Supreme Court in the same matter.

AS TO THE NATURE AND IRREVOCABILITY OF A CERTIFICATE

13. The right in a utility, conferred by government, to operate in the public interest for profit is not a mere license, but is a franchise granted by the government in consideration of the performance of a public service and as such constitutes a property right within the contemplation of the Fourteenth Amendment. Frost v. Corporation Commission, 278 U. S. 515.

14. When accepted and acted upon, as in the present case, such a franchise is irrevocable in the absence of express reservation of a right to revoke. Trustees of Southampton v. Jessup, 162 N. Y. 122, cited with approval in Owensboro v. Cumberland Telephone Co., 230 U. S. 58.

15. A license is personal and revocable but a franchise is in the nature of a grant under authority of Government, conferring a special and usually a permanent right to do an act, or a series

of acts, of public concern, and, when accepted it becomes a contract and is irrevocable unless the right to revoke is expressly reserved. Owensboro v. Cumberland Telephone Co., 230 U. S. 58, pp. 126–127.

16. A franchise is a right or privilege which should be reserved for public control under administration either by the Government directly or by public agents acting under Government regulations, such as public highways, ferries, railroads, etc. To engage in such business is not a matter of common right but a privilege, the exercise of which, except in virtue of a public grant, would be in derogation of the States' power. Such a privilege, by every legitimate test, is a franchise. A railroad franchise was so considered in California v. Pacific R. R. Co., 127 U. S. 1, pp. 40–41. Even a cotton gin under certain conditions will be held to hold such a franchise. Frost v. Corporation Commission, supra.

17. A grant to a railroad confers vested rights and unless otherwise specified will be held to be perpetual, and not for a limited term only. Thunder Bay Limestone Co. v. D. & M. Ry. Co., 294 Fed. 958.

18. In order to constitute a wrongful taking under the Fifth Amendment, the revocation need not be complete but may be partial, such as an attempt to deprive a telephone company of a previously granted right to place telephone poles in the streets. Owensboro v. Cumberland Telephone Co., supra.

19. Where, as here, a certificate has been granted to a common carrier by water authorizing it to operate between specified ports, without any limitation as to time, the rights so granted are perpetual franchise rights and they may not be cancelled, withdrawn, or abridged without violating the Fifth Amendment.

20. By Certificate dated July 2, 1942, the United States Government, through its duly constituted agency, the Interstate Commerce Commission, granted to plaintiff rights as a common carrier of commodities generally between New York, N. Y., and New Orleans, La., and between New York, N. Y. and Texas City, Texas.

21. The rights so certified by the Interstate Commerce Commission July 2, 1942, became legally vested in plaintiff upon its acceptance of the grant and the conduct of its business thereunder including its reliance thereupon in developing its operating properties and assuming large financial commitments.

22. Where, as here, a common carrier by water to which a Certificate has been granted, has acted in reliance thereon by spending large sums of money for the reacquisition of vessels, the purchase of terminal properties and in the maintenance of its organization and facilities, solely in reliance upon the Certificate granted, and before receiving any notice that a revocation of the Certificate was in contemplation, such reliance upon the original grant causes

the franchise rights to become vested and they cannot thereafter be revoked (Owensboro v. Cumberland Telephone Co. and cases cited therein).

23. Part III of the Interstate Commerce Act contains no authority whatsoever in the Interstate Commerce Commission to revoke the franchise rights granted by Certificate to a common carrier by water. The legislative history shows that the power to revoke was withheld upon the recommendation of the Commission itself (p. 11 of counsel's Argument Notes). The omission is the more significant because the Motor Carrier Act, passed five years earlier, expressly authorizes the Commission to revoke a motor carrier certificate (Section 212 of Motor Carrier Act).

24. The fact that the withholding of the power to revoke was upon the recommendation of the Interstate Commerce Commission itself justifies the assumption in law that "in legal import it was not intended to exceed the Commission's recommendation." United States v. Pa. R. Co., 242 U. S. 208.

101 25. The jurisdiction of the Interstate Commerce Commission is strictly statutory and cannot be extended by implication. It may not exercise power, the grant of which has been withheld by the Congress. *Chicago, M., St. P. & P. R. Co.* v. *United States*, 33 Fed. (2d) 582.

26. The cancellation and revocation of most of the franchise rights granted to plaintiff in the Certificate of July 2, 1942, constitutes a wrongful taking of plaintiff's property in violation of the Fifth Amendment.

AS TO ADMISSIBILITY OF PLAINTIFF'S EVIDENCE ON RELIANCE

27. Plaintiff's evidence before the Court on the subject of reliance was properly admitted and defendant's motion to strike must be denied. *Baltimore & Ohio R. Co.* v. *United States*, 298 U. S. 349, 368–9; *United States* v. *Idaho*, 296 U. S., 105, 108–9.

AS TO THE COMMISSION'S LACK OF JURISDICTION TO PRESCRIBE METHODS OF CONDUCTING SERVICE

28. The Commission is without statutory authority to impose on a common carrier by water restrictions as to the service methods by which it shall conduct its common carrier operations.

29. Whereas under the provisions of the Motor Carrier Act (1935) the Commission is given complete power to regulate the service of motor carriers and certificates issued under that Act "shall specify the service to be rendered" (Motor Carrier Act, Section 208), the corresponding section of the Water Carrier Act (Section 309 (d)) provides that a water carrier certificate "shall specify the route or routes over which, or the ports * * *"

and omits the word "service" although otherwise practically identical with the Motor Carrier Act.

30. Whereas Section 309 (d) expressly precludes the Commission from imposing any conditions, terms or limitations as to the right of a carrier to add to its service within the scope of its Certificate, the Motor Carrier Act omits the word "service" with the result that under that Act the Commission can impose service limitations on motor carriers (See p. 44 Plaintiff's main brief).

31. Even if a common carrier by water has handled freight only in railroad cars but desires to give additional service by employing lighters or trucks, or both, on shore and aboard, the Interstate Commerce Commission would be without jurisdiction to prevent such added service because the Commission is expressly precluded by the provisions of Section 309 (d) from attaching any terms, conditions or limitations in respect to additional service within the scope of the certificate.

32. The classification of carriers based on jurisdiction over service which enabled the Commission to "hold a motor carrier in its place in the transportation system" in Crescent Express Lines v. United States, 320 U. S. 401, wherein a motor carrier was held to the use of six-passenger sedans, has no applicability whatsoever to common carriers by water because of the complete lack of jurisdiction in the Commission over the service methods by which common carriers by water shall conduct their common carrier operations. Just as the Commission is without power to tell a railroad what type of locomotive it may use or what kind of freight car it may build or what kind of station it may erect, so the Commission is completely without power to tell a common carrier by water what type of ship it shall operate or what kind of terminal facilities it shall employ in interchange or what kind of containers it shall use or with whom it may interchange freight or from whom it may receive freight or to whom it may deliver freight. The Commission has power in appropriate instances to limit common carriers by water to the handling of particular types of commodities but not to tell them by what service methods they shall conduct their operations.

33. Even if, because of cramped terminal conditions and lack of adequate lighterage berths, Seatrain has used railroad car[illegible] for the transportation of lighterage freight received from [illegible] delivered to various parties at its former berth at Hoboke[illegible] Commission has neither the authority to require the use [illegible]rs for handling such traffic nor to prohibit the transport[illegible] by requiring the traffic to be interchanged with a railroad at both ends of the line and by requiring also that it be handled without transfer, a physical impossibility.

34. To impose restrictions as to service methods would not only "freeze" the service to old patterns, thus preventing maximum service to the public, but it would violate the proviso in Section 309 (d) which prohibits the Commission from imposing restrictions on "the right of the carrier to add to its equipment, facilities, or service within the scope of its certificate."

102 35. The power to attach conditions to the exercise of the privileges granted in a water carrier certificate may not be construed so as to diminish or destroy the privileges themselves. The very language connotes that the privileges themselves are not to be taken away.

AS TO THE DISTINCTION BETWEEN A CERTIFICATE AND A REGULATORY ORDER

36. A Certificate granting franchise rights to a common carrier by water is to be distinguished from an ordinary regulatory "order" which the Commission may, from time to time, modify. The ordinary rate orders and other regulatory orders of the Commission are necessarily subject to change because of fluctuations in wages, costs, volume and other factors, whereas the franchise granted to a common carrier is by its nature permanent and perpetual unless otherwise specified in the grant.[1] (Thunder Bay Limestone Case, supra).

37. The general power vested in the Commission by Section 315 (c) to suspend, modify or set aside its orders, cannot be held to apply to Certificates. In no part of the statute is a Certificate referred to as an order. The power of revocation, expressly withheld by Congress at the Commission's request, cannot be derived through the device of calling a Certificate an "order."

AS TO THE PURPOSE OF CONGRESS

38. The Court will give heed to the declared purpose of Congress to build and maintain a merchant marine and to that end will take notice of the injury which would be done to the merchant marine, where large capital structures and capital improvements are necessary, if certificates can be revoked or the franchise rights granted thereby substantially withdrawn or impaired (Merchant Marine Act, 1936, Section 101; U. S. C., Title 46, Sec. 1101, 49 Stat. 1985).

[1] Plaintiff knows of no case, with the exception of temporary or emergency certificates under Section 311, where a certificate to a common carrier by water has been limited as to time.

AS TO THE NEW YORK-TEXAS CITY APPLICATION

39. Since Plaintiff's Texas City application was not filed under the grandfather clause but was an application for proposed service based on public convenience and necessity, it was the duty of the Commission to make findings as to the extent to which the public convenience and necessity required the proposed service.

40. The Commission erred in arbitrarily measuring the extent of the public convenience and necessity as to the New York-Texas City operation by plaintiff's grandfather rights, themselves erroneously determined, for the New York-New Orleans operation.

41. There is no evidence in the record showing or tending to show that as to the New York-Texas City operation the public interest would be served by limiting plaintiff's service to traffic in railroad cars interchanged with railroads at both ends of the line and without transfer.

42. The "corrected certificate" as to the New York-Texas City operation is unlawful and void because it is beyond the statutory power of the Commission and because it is a violation of the Fifth Amendment to withdraw franchise rights after they have been granted and after reliance thereon by the grantee. The "corrected order" should be annulled and set aside.

AS TO THE NEW YORK-NEW ORLEANS APPLICATION

43. Plaintiff was entitled as a matter of law to a separate certificate and separate findings relating to its New York-New Orleans operation, in accordance with Section 309 (a) of the Act.

44. Where, as here, a common carrier by water shows that it was in bona fide operation as such common carrier of commodities generally on January 1, 1940, over the route or routes or between the ports with respect to which application is made and has so operated since that time except as to interruptions over which applicant has no control, it is mandatory under Section 309 (a) for the Commission to issue certificate for a common carrier of commodities generally without requiring proof of public convenience and necessity "and without further proceedings."

45. The "corrected certificate" as to the New York-New Orleans operation is unlawful and void because it is beyond the statutory power of the Commission and because it is a violation of the Fifth Amendment to withdraw franchise rights after they have been granted and after reliance thereon by the grantee.

AS TO THE CLAIM OF INADVERTENCE

46. That the reopening of the Seatrain certificate case was due to a change in policy, and not to inadvertence, is proved almost to the point of mathematical demonstration by comparing

103 the later decision in the Foss Case with the first decision therein and with Puget Sound Navigation Company Common Carrier Application (not printed), Marine Oil Transp. Co. Common Carrier Application, 250 I. C. C. 588, and Puget Sound Tug & Barge Company Common Carrier Application, 250 I. C. C. 791. In these earlier cases the Commission held that authority to transport commodities generally included the right to transport freight cars, loaded or empty. It is highly significant that on the same day on which it changed its policy in the Foss Case Division 4 reopened the Seatrain case and directed its Bureau of Water Carriers to call Seatrain's attention to the new decision in the Foss Case. This was a change in policy, not inadvertence.

47. A mere unsupported allegation of inadvertence cannot be accepted by the Court as justifying cancellation or substantial withdrawal of franchise rights, else all outstanding certificates would be imperilled.

48. The claim of inadvertence here is entirely contrary to fact because:

(a) The certificate originally granted was the same in form and substance as the certificates granted to other coastwise common carriers.

(b) The Commission had all the data it wanted when the matter was adjudicated, including supplemental data furnished by plaintiff at the Commission's request.

(c) The Commission was perfectly familiar with plaintiff's operations by reason of a number of important proceedings involving plaintiff which were before it during the whole preceding decade.

(d) The certificate originally granted was exactly what plaintiff asked for and was entitled to under Section 309 (a) and 309 (d).

(e) The "corrected certificate" would deprive plaintiff of most of the traffic which it previously handled.

(f) Inadvertence was an impossibility with respect to the Texas City operation because the application there was for a proposed service based on public convenience and necessity and not on grandfather rights.

49. The "corrected certificate" does not represent merely the correction of administrative error but substantial cancellation and revocation of franchise rights.

50. A plea of "inadvertence," even if supported by the facts, should be seasonably advanced and the "correction" made before a long period of time has elapsed during which large sums have been spent in reliance on the franchise rights granted. Here a period of one-and-a-half years elapsed before the first notice of

the Commission's change of mind, and two-and-a-half years elapsed before the "corrected certificate" was issued.

Respectfully submitted.

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OCTOBER 4, 1945.

104 *Appendix*

CERTIFICATE AND ORDER

At a Session of the Interstate Commerce Commission, Division 4, held at its office in Washington, D. C., on the 21st day of September, A. D. 1945

No. W-896

NEWTEX STEAMSHIP CORPORATION COMMON CARRIER APPLICATION

It appearing, That Newtex Steamship Corporation filed an application under the provisions of section 309 (c) of the Interstate Commerce Act for a certificate of public convenience and necessity authorizing it to institute operation as a common carrier by water, that hearings have been held, and that the said division, on January 11, 1945, made and filed a report, 260 I. C. C. 418, containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof, wherein it granted applicant the certificate requested but withheld issuance thereof pending applicant's readiness to begin operations on or before December 31, 1945, provided that applicant within 30 days preceding the date of the commencement of operations shows to the Commission that it is ready to begin the operations described in said findings:

It further appearing, That by petition filed August 16, 1945, said carrier has shown that it has purchased a vessel and has complied with the limitation imposed upon the issuance of the certificate; and the division so finding, therefore:

It is hereby certified, That public convenience and necessity require operation by Newtex Steamship Corporation as a common carrier by self-propelled vessels in the transportation of commod-

ities generally, in interstate or foreign commerce, between the Port of New York, N. Y., and the Ports of Brownsville and Houston, Tex.

It is ordered, That said carrier be, and it is hereby, authorized to perform the services specified above, subject, however, to such terms, conditions, and limitations as are now, or may hereafter be, attached to the exercise of such authority by this Commission.

It is further ordered, That the holding of this certificate by said carrier be, and it is hereby, conditioned upon the exercise of the authority specified above, and upon compliance by said carrier with the requirements of the Interstate Commerce Act and the orders, rules, and regulations of the Commission thereunder.

And it is further ordered, That this certificate and order shall take effect and be in force from and after October 12, 1945.

By the Commission, Division 4.

A true copy:

[SEAL]

W. P. BARTEL,
Secretary of the Interstate Commerce Commission.

105 In the District Court of the United States for the District of Delaware

Civil Action No. 579

SEATRAIN LINES, INC., PLAINTIFF

vs.

UNITED STATES OF AMERICA, DEFENDANT

Opinion

Filed Jan. 30, 1946

Before BIGGS and MCLAUGHLIN, Circuit Judges, and LEAHY, District Judge

By BIGGS, Circuit Judge.

The suit at bar presents vexatious problems. The plaintiff is Seatrain Lines, Inc. whose operations have been the subject of discussion and decisions by the courts [1] and by the Interstate Commerce Commission [2] on numerous occasions. Reference is made to these decisions for general and particular descriptions of Sea-

[1] See United States v. Pennsylvania R. Co., 323 U. S. 612, 613, and I. C. C. v. Hoboken R. Co., 320 U. S. 368, 371-372; Pennsylvania R. Co. v. United States, 56 F. Supp. 473, 476-477, and Hoboken Mfrs. R. Co. v. United States, 47 F. Supp. 779, 781.

[2] See investigation of Seatrain Lines, Inc., 195 I. C. C. 215, 266 I. C. C. 328; Seatrain Lines, Inc. v. Akron, C. & Y. Ry. Co., 220 I. C. C. 7, 243 I. C. C. 199; Hoboken Mfrs. R. Co. v. Akron, C. & Y. Ry. Co., 234 I. C. C. 114; Hoboken Mfrs. R. Co. v. Abilene & S. Ry. Co., 237 I. C. C. 97, 248 I. C. C. 109; Missouri Pac. R. Co. and T. & P. Ry. Co., Service by Water, 245 I. C. C. 143.

train's business. Since October 1932 Seatrain has operated as a common carrier in the transportation of property by water. Seatrain ships carry standard gauge railroad tracks and are so designed that loaded freight cars may be lifted to or from the vessels by a cradle device. Commodities may thus be transported in freight cars from shore to ship and from ship to shore without breaking bulk. The cost of loading and unloading freight at the ports is thus reduced substantially. Prior to the war Seatrain took delivery of freight cars from the trunk line railroads at the Port of New York and delivered the cars to trunk line railroads at Belle Chasse, the Port of New Orleans. Seatrain also delivered liquid cargoes in bulk and transported commodities generally. A comparatively small part of the commodities shipped originating at Seatrain's own terminals. Most of the commodities transported were carried in railroad cars put on board the vessels by the peculiar Seatrain devices.[3]

In May 1940, Seatrain inaugurated substantially similar service between the port of New York and Texas City, Texas.

On May 28, 1941 Seatrain filed two applications with the Interstate Commerce Commission for certificates of convenience and necessity as a common carrier of commodities generally between New York and New Orleans and New York and Texas City, respectively. The "grandfather date" applicable to water carriers is January 1, 1940. See Section 309 (a), Part III, Interstate Commerce Act, 49 U. S. C. A. § 909 (a). One of Seatrain's two applications to the Commission was for a certificate as a common carrier of commodities generally between New York and New Orleans under the "grandfather" clause. Its second application was for a certificate for its New York and Texas City service as a common carrier of commodities generally, without benefit of the grandfather clause, pursuant to Section 309 (a) and (c). Notice of these applications was given by the ICC to certain competing steamship lines, common carriers of commodities generally. On
106 July 2, 1942 the ICC by Division 4 filed a decision[4] granting Seatrain a single certificate as a common carrier by self-propelled vessels of commodities generally between New York and New Orleans and between New York and Texas City. The certificate contained a clause in the usual form stating that the carrier was authorized to perform the service specified subject "* * * to such terms, conditions, and limitations as are now, or may hereafter be, attached to the exercise of such authority by this Commission." The Division laid emphasis in its opinion on the peculiar value of the Seatrain service in that shipments were

[3] Seatrain also had accommodations for two passengers on each vessel. We are not presently concerned, however, with this service.
[4] Not reported for publication.

made in carload lots without breaking bulk and loading and unloading the cars at the ports.

The certificate was ordered to take effect from and after August 10, 1942. Seatrain asserts and has proved, as will hereinafter appear, that acting upon the authority granted by the certificate it has made substantial expenditures and important commitments for the future.[5]

On December 18, 1943, however, Division 4 ordered reconsideration of Seatrain's applications and of the applications for certificates of the Foss Launch & Tug Co. See 260 I. C. C. 103. The division thereafter amended the certificate first issued to the Foss Company on August 26, 1942. The certificate originally issued by the Commission to the Foss Company authorized it to transport commodities generally. The amended certificate issued to the Foss Company eliminated the company's authority to "transport freight cars, loaded or empty, in the performance of a freight-car-ferry service." The course pursued by Division 4, and hence by the Commission, in respect to the Foss company had repercussions on the Seatrain certificate. See also the decision of the Commission in Newtex S. S. Corporation Common Carrier Application, 260 I. C. C. 418. On February 6, 1945, having granted Seatrain an opportunity for the presentation of evidence of which Seatrain did not avail itself and after certain intermediate steps which need not be recited here, the full Commission, one member only being absent, over the protests of Seatrain in respect to the Commission's jurisdiction, ordered Seatrain's original certificate cancelled and a new certificate issued in lieu thereof.

The new certificate limited Seatrain to the service of "a common carrier by self-propelled vessels * * * in the transportation of liquid cargoes in bulk; of empty railroad cars; and of property loaded in freight cars received from and delivered to rail carriers and transported without transfer from railroad cars between the Ports" of New York and New Orleans on the one hand and New York and Texas City on the other.[6] Mr. Brush, the president of Seatrain, testified before this court that the limitations placed upon Seatrain's service by this amendment to its certificate will substantially impair the business of Seatrain, will render useless the expenditures and commitments heretofore made by Seatrain and will result in serious losses to the company.

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[5] See the opinion of the Commission in the case at bar, 260 I. C. C. 430. Commissioner Porter stated in this opinion, p. 442, "Applicant asserts that pursuant to, and in reliance upon, the certificate it made plans to reenter the coastwise trade and has incurred substantial expense and made important commitments for the future. * * *" See also the testimony of Graham M. Brush, president of Seatrain, at the hearing before this court.

Seatrain's services were terminated by the War, its vessels being requisitioned by the United States. It has planned to recreate and extend its services as indicated.

[6] Cf. the decision of the Commission in Newtex S. S. Corporation Common Carrier Application, 260 I. C. C. 418.

Seatrain has petitioned this court [7] to set aside the order of the Commission entered February 6, 1945 and the corrected certificate of public convenience and necessity embodied in that order.

The Commission was not unanimous in the views expressed in its opinion of February 6, 1945.[8] One Commissioner concurred
107 in a separate opinion and three Commissioners dissented in separate opinions. The Commissioners who joined in the majority opinion and the concurring Commissioner took the position that in granting the original certificate to Seatrain authorizing it to transport commodities generally the Division had committed an inadvertent error or a mistake which should be corrected by the amended certificate. The dissenting Commissioners took the view that the action of Division 4 in granting the original certificate to Seatrain was not the result of inadvertence or a mistake but represented the studied policy of the Commission until the reopening of, and the issuance of the amended certificate in, the Foss case. One Commissioner was of the opinion that when a certificate of convenience and necessity has been issued to a common carrier by water that certificate is a franchise and may not be revoked.[9]

The principal issue which we must decide is the authority of the Commission to alter drastically its original certificate. The original certificate permitted the petitioner, as we have stated, to engage in the transportation of commodities generally as a common carrier by water. The amended certificate limiting transportation to property loaded in freight cars received from and delivered to rail carriers without transfer, in effect reduces Seatrain to the status of a car-ferry. It may not initiate or terminate traffic; it may not deliver freight to a truck or any receiver other than a railroad. Such a change in status scarcely can be considered to lie within the permissible rights reserved in the former certificate to change "terms, conditions, and limitations * * * attached to the exercise" of the authority. This clause is based on the provisions of Section 309 (d) of the Act, 49 U. S. C. A. § 909 (d), but the "terms, conditions, and limitations" contemplated by Congress were of the kind that were before the Supreme Court in Crescent Express Lines, Inc. v. United States, 320 U. S. 401 and in Noble v. United States, 319 U. S. 88. The terms or conditions or limitations which may be imposed by the Commission under the authority of the section cited cannot sanction the radical step which the Commission has taken of transmuting a common carrier by water of commodities g rally into a car-ferry.

[7] Pursuant to the provisions of the Commerce Court Act and the Urgent Deficiencies Act as reenacted. See 28 U. S. C. A. § 41 (28) and §§ 43 to 48, inclusive.

[8] See 260 I. C. C. 330.

[9] No other member of the Commission took this view. All the other members rejected it either expressly or implicitly.

There is no statutory authority for the revocation or alteration of a certificate. The Commission relies on Sections 17 (7) and 315 (c) of the Act, 49 U. S. C. A. §§ 17 (7) and 915 (c). The first subsection referred to is from Part I of the Act relating by reference to common carriers by water. That subsection makes determinations by the Commission subject to rehearing and reconsideration and provides that the Commission or a division of the Commission may change or modify any decision, order, or requirement made by a division. Subsection (c) of Section 315 provides that "The Commission may suspend, modify, or set aside its orders under this part upon such notice and in such manner as it shall deem proper." The provision last quoted is intended to apply to regulatory orders of the Commission and not to permit the cancellation of orders authorizing the issuance of certificates of public convenience and necessity. It is our opinion that these statutory provisions do not aid the standing of the Commission's order of February 6, 1945.

Section 212 (a), Part II of the Act, 49 U. S. C. A. § 312 (a), dealing with Motor Carriers, provides a method whereby a certificate issued to a motor carrier may be suspended or terminated by the Commission. We think it must be conceded that insofar as the termination or revocation of a certificate issued to a motor carrier under Part II of the Act is concerned, the power of the Commission to terminate or revoke is created and defined in Section 212 (a); that if the Commission does not act under that section it is without power to terminate or revoke the certificate of a motor carrier. The Commission has so held. Smith Bros., Revocation of Certificate, 33 M. C. C. 465. Part III of the Act contains no similar provision. The Commission itself prior to the enactment of the Transportation Act of 1940, 54 Stat. 898, called this very fact to the attention of Congress. Commissioner
108 Eastman, Chairman of the Commission's Legislative Committee, reporting to the Senate Committee on Interstate and Foreign Commerce and the House Committee on Interstate and Foreign Commerce on S. 2009 on January 29, 1940, stated, "This bill leaves section 212 (a) unchanged and has no corresponding provision in the new part III. While there is room for argument we are inclined to believe that provision for the revocation or suspension of water-carrier certificates is not essential if adequate penalty provisions are provided for violation of part III. Revocation or suspension, in the case of motor carriers, is believed to be the most effective means of enforcement since there are so many such carriers and the operations of the great majority are so small, that enforcement through penal actions in courts pre-

sents many practical difficulties, but this is not true of water carriers." [10]

Congress did not include in Part III any express power to change, amend or revoke a certificate held by a carrier by water. We agree with Commissioner Lee that the conclusion seems inescapable that Congess did not intend to confer upon the Commission power to revoke a certificate of public convenience and necessity issued to a common carrier by water. Whether the certificate when issued be called a "franchise" or not seems relatively unimportant.[11] Whatever be its proper name, it is a creature of the statute. Under the particular circumstances presented here, once the certificate was given it may not be revoked, canceled or limited any any substantial fashion. The statute confers no such power on the Commission and, as we have stated, the Commission's powers are purely statutory.[12]

It is clear that the Commission may not amend the certificate by changing its essential grant as in the case at bar. It is agreed that there was no fraud in the procurement of the certificate.[13] The Commission asserts, however, that the original grant was made through inadvertance and that it has the right to correct such errors. There is no authority for such remedial action. If the Commission may correct inadvertent errors its power to do so must be deemed to lie in the general authority conferred upon any quasi-judicial or administrative body. Assuming an analogy to the remedial powers of courts to be persuasive, after the end of the term at which the judgment was rendered a court could not reopen the record to correct other than clerical errors except by recourse under unusual circumstances to the ancient writ of coram nobis.[14] The mistake of the Commission made by its Division 4 was certainly not clerical and the common law writ is not available to the Commission. Even if it were there are no circumstances in the case at bar which would warrant its application by analogy.

Although the Commission terms the issuance of the original certificate as an instance of inadvertent error, it appears to have

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[10] Letter from the Chairman of the Legislative Committee, Interstate Commerce Commission, transmitting to the Chairman of the Senate Interstate Commerce Committee and the Chairman of the Committee on Interstate and Foreign Commerce of the House of Representatives a report relative to omnibus transportation legislation, S. 2009, as passed by both houses of Congress, dated January 29, 1940; House Committee print, United States Government Printing Office, Washington, 1940.
The same document is cited in note 5 to the decision in Ziffrin, Inc. v. United States, 318 U. S. 73, 77.

[11] If the certificate be deemed a franchise, since it grants rights to engage in business of a public nature, the grant which it contains is protected by the Fifth Amendment to the Constitution. Unless the right be reserved, the grant may not subsequently be impaired. Frost v. Corporation Commission, 278 U. S. 515; Owensboro v. Cumberland Telephone Co., 230 U. S. 58. The inviolability of the certificate is clear whether it be considered a purely statutory creation or to be of the nature of a franchise.

[12] United States v. Pennsylvania R. Co., 242 U. S. 208; Interstate Commerce Commission v. Cincinnati, N. O. & T. P. Ry. Co., 167 U. S. 479.

[13] Cf. Hazel-Atlas Glass Co. v. Hartford Empire Co., 322 U. S. 238.

[14] Cf. United States v. Steese, 144 F. 2d 439. See Rule 60 (b) of the Federal Rules of Civil Procedure, 28 U. S. C. A. foll. § 723c permitting corrections of errors due to the litigant's inadvertence.

resulted from the considered judgment of Division 4 and, therefore, of the Commission. While the petitioner's references to the Foss and the Newtex cases are helpful perhaps in forming a basis to conjecture the Commission's trend of policy, it is unnecessary and indeed improper to attempt to ascertain the mental
109 processes of the Commissioners at the time of the issuance of the original order and certificate. The Supreme Court in the recent case of Mine Workers v. Eagle Picher Co., 325 U. S. 335, addressed itself to the problem of the correction by an administrative body of its own error. In the cited case the National Labor Relations Board had applied to the Circuit Court of Appeals for the Eighth Circuit for the enforcement of a back pay order and had stated incorrectly the method for computation of the back pay, resulting in a drastic curtailment of pay admittedly owed the employees. The Circuit Court had adopted the Board's method of computation and had approved it in its decree. The company was not prejudiced by this order. Nevertheless, the Supreme Court refused to permit the correction of the patent error. In discussing the question of inadvertence Mr. Justice Roberts speaking for the Court cogently declared, id. p. 341, "Administrative flexibility and judicial certainty are not contradictory; there must be an end to disputes which arise between administrative bodies and those over whom they have jurisdiction. This does not mean that the Board could not frame an order which by its terms required modification should conditions change. But here the order was definite and complete; * * * The conditions remained the same; what changed was the Board's awareness of them." In the case at bar the Commission has not applied to the courts. However, we believe that the reasoning of the Supreme Court is applicable by analogy to final administrative orders including the order of the Commission granting the original certificate.

The testimony introduced by the petitioner showing its expenditure of funds and its large commitments in reliance upon the original certificate will not be stricken from the record. The petitioner has alleged that the Commission's order will deprive it "* * * of property and take its property for public use without just compensation and without due process of law in violation of the Fifth Amendment * * *." The evidence referred to is pertinent to the question, one of mixed law and fact, raised by the petitioner. The testimony objected to supports the conclusion that the petitioner will be deprived of property without compensation and without due process of law if the order of the Commission shall become effective. See B. & O. R. Co. v. United States,

298 U. S. 349, 368–9, and United States v. Idaho, 298 U. S. 105, 108–9. See also Commissioner Porter's statement, note 5 supra.

The Commission has made the argument that the original certificate was too limited in that it did not give Seatrain the right to transport empty freight cars. Therefore, the second certificate, it reasons, is in reality broader than the first. We reject this contention. If the first certificate does not authorize Seatrain to transport empty freight cars, that question may be tested in some appropriate manner. The phraseology of the certificate cannot serve, of course, to impair Seatrain's rights under the grandfather clause in respect to the New York-Belle Chasse route. United States v. Maher, 307 U. S. 148; Quaker City Bus Co., 38 M. C. C. 603.

The order of the Commission will be set aside.

Findings of fact and conclusions of law are filed with this opinion.

110 In United States District Court

Findings of fact

Filed Jan. 30, 1946

1. The petitioner, Seatrain Lines, Inc., filed seasonably with the Commission two separate applications: (1) an application for a certificate covering petitioner's New York-New Orleans operation, based on "grandfather" rights; and (2) a separate application, based not on grandfather rights, but on a showing of public convenience and necessity, for Seatrain's proposed New York-Texas City operation.

2. Division 4 of the Commission consisting of three members, issued its report, dated July 2, 1942, wherein the Division found:

"We find that Seatrain Lines, Inc. was in bona fide operation on January 1, 1940, as a common carrier by selfpropelled vessels, in interstate or foreign commerce, in the transportation of commodities generally between the ports of New York and New Orleans, by way of the Atlantic Ocean and the Gulf of Mexico; and that such operation has been continued since that date, except for an interruption of service over which applicant had no control.

111 "We further find that the present and future public convenience and necessity require operation by applicant as a common carrier by selfpropelled vessels, in interstate or foreign commerce, in the transportation of commodities generally between the ports of New York and Texas City, by way of the same route; and that applicant is fit, willing, and able to continue the operation.

"We further find that applicant is entitled to a certificate authorizing such operations, subject, however, to general conditions which are necessary to carry out, with respect to continuance of applicant's operations, the requirements of part III of the act and the orders, rules, and regulations of the Commission thereunder. For the reasons given above, that portion of the application seeking authority to transport passengers between New York and New Orleans will be denied."

A certificate issued to become effective on August 10, 1942, the body of which reads as follows:

"Seatrain Lines, Inc. having filed applications under the provisions of section 309 (a) and (c) of the Interstate Commerce Act for a certificate of public convenience and necessity authorizing continuance of its operations as a common carrier by water, a full investigation of the matters and things involved having been made, and said division on the date hereof, having made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

"It is hereby certified, That public convenience and necessity require the continuance of operations by Seatrain Lines, Inc., as a common carrier by selfpropelled vessels, in interstate or
112 foreign commerce, in the transportation of commodities generally between the ports of New York, N.. Y., New Orleans, La., and Texas City, Tex., by way of the Atlantic Ocean and the Gulf of Mexico.

"It is ordered, That said carrier be, and it is hereby authorized to perform the service specified above, subject, however, to such terms, conditions, and limitations as are now, or may hereafter be, attached to the exercise of such authority by this Commission.

"It is further ordered, That the holding of this certificate by said carrier be, and it is hereby, conditioned upon the exercise of the authority specified above, and upon compliance by said carrier with the requirements of the Interstate Commerce Act and the orders, rules, and regulations of the Commission thereunder.

"It is further ordered, That the portion of the application seeking authority to transport passengers between New York and New Orleans be, and it is hereby, denied.

"And it is further ordered, That this certificate and order shall take effect and be in force from and after August 10, 1942.

"By the Commission, division 4."

3. About 18 months later, on December 18, 1943, the Commission, on its own motion, reopened the case for reconsideration, and by another order, dated January 27, 1944, it was provided:

"It is ordered, That the said proceeding be, and it is hereby reopened for hearing upon the question of whether or not the said

findings and certificate and order of July 2, 1942, should be modified so as to authorize applicant to continue to operate in
113 service in which it was engaged, except for interruptions beyond its control, namely; as a common carrier by the 'Seatrain' type of vessels in the transportation of liquid cargoes in bulk; of empty railroad cars, and of property loaded in freight cars received from and delivered to rail carriers and transported without transfer from the freight cars between the ports above mentioned.

"And it is further ordered, That this proceeding be, and it is hereby assigned for hearing at the offices of the Commission in Washington, D. C., at 9:30 A. M. on February 28, 1944, before Commissioner Porter and Examiner Copenhafer."

4. A motion for vacation or recission of the reopening order was filed by Seatrain on March 24, 1944, and renewed at the hearing of March 27, 1944.

5. No evidence was introduced at the March 27, 1944, hearing for the reasons stated but the motion for vacation of the reopening order was presented to the entire Commission and denied on April 3, 1944, "without prejudice to its renewal at the conclusion of the hearing to be held pursuant to said order of reopening."

6. Following the filing of petitions for intervention, which were granted, by the Ocean Steamship Company of Savannah, Agwilines, Inc., Eastern Steamship Company, and the Bull Steamship Lines, the matter came on for further hearing before Commissioner Porter on April 24, 1944. Seatrain offered no evidence.

7. The entire Commission on May 8, 1944, by order, affirmed its earlier action overruling Seatrain's application to dismiss the proceedings for lack of jursdiction in the Commission to proceed. The case was fully argued before the entire Commission on July 21, 1944.

114 8. On February 6, 1945, the Commission decided the case, three Commissioners dissenting, one concurring, and one Commissioner not participating. In its report the Commission made the following findings and conclusions.

"Upon reconsideration and hearing we find that the following facts among others have been established:

"1. Applicant was engaged on and since January 1, 1940, except for interruptions beyond its control, in the operation of self-propelled vessels designed for the transportation of (1) property when loaded in railroad cars, (2) empty railroad cars, and (3) liquid cargoes in bulk.

"2. Applicant's vessels have all been taken over by the United States Maritime Commission and applicant is not now in operation and had not operated for several months prior to the date on which the certificate was issued by division 4.

"3. Applicant was engaged on January 1, 1940, and continuously since, except for interruptions beyond its control, in the transportation by water, by self-propelled vessels, in interstate or foreign commerce, of liquid cargoes in bulk; of empty railroad cars, and of property loaded in railroad cars received from and delivered to rail carriers and transported without transfer from railroad cars, between the ports of New York and New Orleans by way of the Atlantic Ocean and the Gulf of Mexico.

"4. Applicant is fit, willing, and able to continue operations instituted after January 1, 1940, between New York and Texas City, in the transportation by water, by self-propelled vessels, in interstate or foreign commerce, of liquid cargoes in bulk; of
115 empty railroad cars, and of property loaded in railroad cars received from and delivered to rail carriers and transported without transfer from railroad cars, which operations are required by public convenience and necessity.

"5. Applicant seasonably filed applications for authority to continue the operations described in paragraphs 3 and 4.

"6. Applicant has not engaged in transportation of property in so-called 'break-bulk' service, but has confined its operations exclusively to transportation of property loaded in railroad cars, of empty railroad cars, and of liquid cargoes in bulk in special tanks.

"7. Applicant's operations, because of the special type and nature, have been recognized as superior to, and differing from, those performed by the break-bulk lines.

"8. The certificate now in effect by inadvertence erroneously describes the operations in which applicant was engaged on and since the 'grandfather' date and during the interim period.

Conclusions

"Upon hearing and reconsideration, we conclude that Seatrain Lines, Inc., is entitled to a certificate authorizing it to continue operations as a common carrier by water, by self-propelled vessels, in interstate or foreign commerce, in the transportation of liquid cargoes in bulk; of empty railroad cars, and of property loaded in railroad cars received from and delivered to rail carriers, and transported without transfer from the railroad cars, between the ports of New York, New Orleans, and Texas City by way of the Atlantic Ocean and the Gulf of Mexico; subject, however, to general conditions which are necessary to carry out, with
116 respect to the continuance of applicant's operations, the requirements of part III of the act and the orders, rules, and regulations of the Commission thereunder. In other respects the findings and conclusions of the prior report are affirmed.

"The certificate and order heretofore entered in this proceeding will be superseded and cancelled, and a corrected certificate and

order will be issued to conform to the record, and our findings herein."

9. In its report of February 6, 1945, the Commission, in answer to the contention that considerable expense had been incurred by plaintiff on the strength of the decision of Division 4, stated that although the proceeding had been twice set for hearing, no evidence was offered by plaintiff, consequently it found that "The record theretofore contains no specific showing in that respect."

10. On the same date as it issued its report, February 6, 1945, the Commission entered the following corrected certificate and order.

"Further consideration having been had of the record in this proceeding, a hearing having been held, and the Commission on the date hereof having made and filed a report on reconsideration containing its findings of fact and conclusions thereon, which report, together with the prior report of July 2, 1942, is hereby referred to and made a part hereof:

"It is hereby certified, That public convenience and necessity require the continuance of operation by Seatrain Lines, Inc., as a common carrier by self-propelled vessels, in interstate or foreign commerce, in the transportation of liquid cargoes in bulk; of empty railroad cars; and of property loaded in railroad cars re-
117 ceived from and delivered to rail carriers and transported without transfer from railroad cars between the ports of New York, N. Y., New Orleans, La., and Texas City, Tex., by way of the Atlantic Ocean and the Gulf of Mexico;

"It is ordered, That said carrier be, and it is hereby, authorized to perform the service specified above, subject, however, to such terms, conditions, and limitations as are now, or may hereafter be, attached to the exercise of such authority by this Commission.

"It is further ordered, That the holding of this certificate by said carrier be, and it is hereby, conditioned upon the exercise of the authority specified above, and upon compliance by said carrier with the requirements of the Interstate Commerce Act and the orders, rules, and regulations of the Commission thereunder.

"It is further ordered, That the portion of the application seeking authority to transport passengers between New York and New Orleans be, and it is hereby, denied.

"And it is further ordered, That the certificate and order issued on July 2, 1942, be, and it is hereby, superseded and cancelled as of the effective date of this corrected certificate and order; and that this corrected certificate and order shall take effect and be in force from and after May 21, 1945."

11. The effective date of the Commission's order and certificate, viz, May 21, 1945, has been voluntarily postponed until February 21, 1946.

12. On May 12, 1945, petitioner Seatrain filed its bill of complaint in this court alleging that the Commission's report and certificate of February 6, 1945, were beyond the authority of the Commission.

13. The United States filed an answer, denying the material allegations of the complaint; the Commission intervened
118 in support of the validity of its order, and filed an answer to the same effect.

14. The proceeding was orally argued before a three-judge court, convened pursuant to statute, on July 20, 1945, and has been submitted to the court on briefs and reply briefs as well as oral argument. The entire record before the Commission was introduced in court at that time.

15. At the hearing before this court on July 20, 1945, petitioner, over objections of defendants, was permitted, subject to later ruling by the court on the objection, to introduce evidence de novo in court as appears from the opinion of the court, and the matter is now before this court for determination.

16. Seatrain has made substantial expenditures and commitments in reliance upon the original certificate issued by the Commission. If the order of the Commission of February 6, 1945, becomes effective Seatrain will incur large monetary losses.

Based on the foregoing findings of fact, the court makes the following

Conclusions of law

1. The court has jurisdiction of the parties and of the subject matter of this suit.

2. The motion of the defendants to strike the testimony of Mr. Brush, received on behalf of Seatrain, is denied.

3. The certificate issued by the Commission on July 2, 1942, was granted under the authority conferred upon the Commission under Section 309 (a) and 309 (d) of Part III of the Interstate Commerce Act.

4. The Commission lacked authority to enter its order of February 6, 1945, and to issue the corrected certificate pursuant thereto.

119 5. The order of the Commission of February 6, 1945, results in a confiscation of Seatrain's property without just compensation and without due process of law.

6. The order of the Commission of February 6, 1945, must be set aside.

For the Court:

(S) JOHN BIGGS, Jr.,
United States Circuit Judge.

Dated January 30th, 1946.

120 In United States District Court

Final decree

Filed February 7, 1946

Before the Honorable John Biggs, Jr., United States Circuit Judge, Honorable Gerald McLaughlin, United States Circuit Judge, and Honorable Paul Leahy, United States District Judge, sitting pursuant to provisions of an act of Congress known as Urgent Deficiencies Act (38 Stat. L. 220) approved October 22, 1913.

This cause came on for final hearing on the 20th day of July 1945 on plaintiff's petition, defendants' answers, and the evidence submitted by plaintiff and defendants, and arguments for plaintiff and defendants were heard. Upon consideration thereof, all of said judges concurring, the court being fully advised in the premises, and having filed in this cause its findings of fact and conclusions of law, do find in accordance with its written opinion filed in this cause that the plaintiff is entitled to the relief prayed,

It is accordingly ordered, adjudged, and decreed by the court:

That the order of the Interstate Commerce Commission entered on the 6th day of February 1945, in Docket No. W–543, Seatrain Lines, Inc., Common Carrier Applications, a copy of which is attached to the bill of complaint as Exhibit No. "A," be, and the same is hereby, set aside and annulled, and its enforcement perpetually enjoined.

February 6th, 1946.

(S) JOHN BIGGS, Jr.,
United States Circuit Judge.
(S) GERALD MCLAUGHLIN,
United States Circuit Judge.
(S) PAUL LEAHY,
United States District Judge.

Approved (as to form):
(S) WILBUR LAROE, Jr.,
Solicitor for Plaintiff.
(S) EDWARD DUMBAULD,
Special Assistant to the Attorney General,
Counsel for United States of America, defendant.
(S) DANIEL W. KNOWLTON,
General Counsel, Interstate Commerce Commission, intervening defendant.

121 In United States District Court

[Title omitted.]

Petition for appeal

Filed February 27, 1946

The United States of America and the Interstate Commerce Commission, defendant and intervening defendant in the above-entitled case, feeling themselves aggrieved by the final decree of the United States District Court for the District of Delaware, entered in said court on February 7, 1946, pray an appeal from said decree to the Supreme Court of the United States.

The particulars wherein said defendants consider the decree erroneous are set forth in the assignment of errors accompanying this petition, to which reference is hereby made.

Said defendants pray that a transcript of the record, proceedings and papers on which said decree was made and
122 entered, duly authenticated, be transmitted forthwith to the Supreme Court of the United States.

Dated February 27, 1946.

WENDELL BERGE,
Assistant Attorney General,
EDWARD DUMBAULD,
Special Assistant to the Attorney General.
J. J. MORRIS,
United States Attorney,
For the United States of America.
DANIEL W. KNOWLTON,
Chief Counsel,
E. M. REIDY,
Assistant Chief Counsel,
For the Interstate Commerce Commission.

123 In the District Court of the United States

For the District of Delaware

Civil Action No. 579

SEATRAIN LINES, INC., PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

and

INTERSTATE COMMERCE COMMISSION, INTERVENING DEFENDANT

Order allowing appeal

Filed February 27, 1946

In the above-entitled cause the United States of America and the Interstate Commerce Commission, defendant and intervening defendant, having made and filed a petition praying an appeal to the Supreme Court of the United States from the final decree of this court in this cause entered on February 7, 1946, and having also made and filed an assignment of errors, and a statement of jurisdiction, and having in all respects conformed to the statutes and rules of court in such case made and provided;

It is ordered and decreed, that the appeal be, and the same is hereby allowed as prayed for.

Dated February 27, 1946.

PAUL C. LEAHY,
United States District Judge.

124 [Citation in usual form showing service on Caleb R. Layton, 3d, filed Feb. 27, 1946, omitted in printing.]

126–128 In United States District Court

Notice of appeal

Filed February 27, 1946

To the Attorney General for the State of Delaware:

You are hereby notified that the District Court of the United States for the District of Delaware on February 27, 1946, filed and entered an order allowing an appeal by the United States and the Interstate Commerce Commission to the Supreme Court of the United States from a decree filed and entered on February 7, 1946, in the above-entitled case, and that the citation signed

by such court on February 27, 1946, in connection with the order allowing such appeal, is made returnable within 20 days from the date of the signing of such citation.

Attached hereto are copies of each of the following documents:

1. The citation referred to above.
2. Petition for and order allowing said appeal.
3. Defendants' jurisdictional statement and assignment of errors pursuant to Rule 12 of the revised Rules of the Supreme Court of the United States.
4. Statement required to be served upon appellee by said Rule 12.

This notice is given you pursuant to the provisions of U. S. Code, Title 28, Sec. 47a, enacted March 3, 1911, c. 231, Sec. 210.

Dated February 27, 1946.

WENDELL BERGE,
Assistant Attorney General,
EDWARD DUMBAULD,
Special Assistant to the Attorney General,
J. J. MORRIS,
United States Attorney,
For the United States of America.
DANIEL W. KNOWLTON,
Chief Counsel,
E. M. REIDY,
Assistant Chief Counsel,
For the Interstate Commerce Commission.

Received a copy of the foregoing notice this 27th day of February 1946.

(S) CLAIR J. KILLORAN,
Attorney General for the State of Delaware.

130–167 In United States District Court

[Title omitted.]

Assignment of errors

Filed February 27, 1946

Now come the United States of America and the Interstate Commerce Commission, defendants in the above-entitled cause, by their respective counsel, and in connection with their appeal, file the following assignment of errors upon which they will rely in the prosecution of their appeal to the Supreme Court of the United States from the final decree of this court entered February 7, 1946.

The District Court erred:

1. In not dismissing the petition herein.

2. In setting aside the Commission's certificate of February 6, 1945.

3. In holding that prior to the war, Seatrain Lines, Inc., transported commodities generally between the ports of New York and Belle Chasse, La., and that in May 1940, it inaugurated substantially similar service between the port of New York and Texas City, Texas.

168 4. In failing to hold that the two applications filed by Seatrain Lines, Inc., with the Commission on May 28, 1941, were for the continuance of operations previously instituted.

5. In holding that petitioner, acting upon the authority granted by the certificate of Division 4, has made substantial expenditures and important commitments for the future.

6. In permitting, over the defendants' objections thereto, the introduction of evidence de novo in court on the question of expenditures and commitments made by petitioner upon the authority granted by the certificate issued by Division 4.

7. In failing to hold that petitioner should have presented evidence with respect to expenditures and commitments made by petitioner following the issuance of the certificate isued by Division 4 to the Commission instead of in the first instance permitting such evidence to be introduced in court.

8. In treating the mere unsupported allegation of confiscation in the petition as a basis for introduction of evidence de novo in court.

9. In holding that the testimony introduced de novo in court over defendants' objections supports the conclusion that the petitioner will be deprived of property without compensation and without due process of law if the order of the Commission shall become effective.

10. In apparently treating of some significance the fact that the Commissioners were not unanimous in their decision under review.

11. In holding that the amended certificate in effect reduces Seatrain to the status of a car ferry, and in failing to hold that the amended certificate gives Seatrain that "substantial parity" between future operations and prior bona fide operations which it was the purpose of the statute to assure.

169 12. In holding that the amended certificate constitutes such a change in status that it "scarcely can be considered to lie within the permissible rights reserved in the former certificate to change 'terms, conditions, and limitations * * * attached to the exercise' of the authority."

13. In holding that under section 309 (d) of Part III of the Act, the Commission did not have the authority to impose the terms and conditions which it did impose.

14. In holding that the Commission in effect has transmuted "a common carrier by water of commodities generally into a carferry."

15. In holding that there is no statutory authority for the revocation or alteration of a certificate.

16. In holding that section 315 (c) of Part III "is intended to apply to regulatory orders of the Commission and not to permit the cancellation of orders authorizing the issuance of certificates of public concenience and necessity," and that the "statutory provisions do not aid the standing of the Commission's order of February 6, 1945."

17. In holding that Congress did not intend to confer upon the Commission power to revoke a certificate of public convenience and necessity issued to a common carrier by water, and in failing to hold that the Commission was merely correcting a prior certificate and modifying its terms and conditions as authorized by the statute.

18. In apparently failing to make any distinction between the mere alteration or modification of a certificate and a complete revocation thereof.

170 19. In holding that the statute confers no power on the Commission, under the particular circumstances presented here to revoke, cancel or limit it in any substantial fashion once "the certificate was given."

20. In holding, contrary to the holding of the Commission construing its prior certificate, that the original certificate of Division 4, was not issued as a result of inadvertence.

21. In rejecting the contention of the Commission that the second certificate is in reality broader than the original certificate for the reason that the latter did not give Seatrain the right to transport empty freight cars, which right the second certificate confers.

22. In finding, as a fact, that Seatrain has made substantial expenditures and commitments in reliance upon the original certificate issued by the Commission and that "if the order of the Commission of February 6, 1945, becomes effective Seatrain will incur large monetary losses," no evidence to that effect having been presented to the Commission although petitioner was afforded ample opportunity to present such evidence.

23. In ruling, as a conclusion of law, that the motion of defendants to strike the testimony of Mr. Brush, received on behalf of Seatrain, is denied.

24. In ruling, as a conclusion of law, that the Commission lacked authority to enter its order of February 6, 1945 and to issue the corrected certificate pursuant thereto.

171 25. In ruling, as a conclusion of law, that the order of the Commission of February 6, 1945, results in a confiscation of Seatrain's property without just compensation and without due process of law.

26. In ruling, as a conclusion of law, that the order of the Commission of February 6, 1945, must be set aside.

27. In entering its final decree of February 7, 1945.

Wherefore, defendants pray that the said decree be reversed.

Dated February 27, 1946.

WENDELL BERGE,
Assistant Attorney General,
EDWARD DUMBAULD,
Special Assistant to the Attorney General,
J. J. MORRIS,
United States Attorney,
For the United States of America.
DANIEL W. KNOWLTON,
Chief Counsel,
E. W. REIDY,
Assistant Chief Counsel,
For the Interstate Commerce Commission.

172–175 In United States District Court

[Title omitted.]

Order as to exhibits

Filed February 27, 1946

In accordance with the provisions of Section 47A of Title 28, U. S. Code, and with the provisions of defendants' praecipe for transcript of record on appeal of the above-entitled matter to the Supreme Court of the United States:

It is hereby ordered, That the documents and papers received in evidence in the District Court in the trial of this cause, as Plaintiff's Exhibits 1 and 2, and Defendants' Exhibit 1, and the stenographer's transcript of the proceedings held before the three-judge court on July 20, 1945, may all be forwarded, in lieu of copies of such documents and papers, to the Clerk of the Supreme

Court of the United States as a part of the transcript of the record on appeal herein.

176 Dated this 27 day of February 1946.

PAUL LEAHY,
United States District Judge.

Service of Order As To Exhibits is hereby acknewledged this 27th day of February 1946.

CALEB R. LAYTON, 3rd,
Continental American Bldg.,
Wilmington, Del.

177 In United States District Court

Praecipe for transcript of record

Filed February 27, 1946

To the Clerk of the above-named Court:

You will please prepare a transcript of the record in the above-entitled consolidated causes to be transmitted to the Clerk of the Supreme Court of the United States and include in said transcript the following:

1. Petition, and exhibits A–N, inclusive, attached thereto.
2. Order of June 2, 1945, assembling a three-judge court.
3. Answer of United States.
4. Intervention of Interstate Commerce Commission.
5. Answer of Interstate Commerce Commission.
6. Plaintiff's Exhibits 1 and 2, and Defendants' Exhibit 1, introduced in District Court on July 20, 1945.

178 7. Stenographer's transcript of hearing held at Wilmington, Del., July 20, 1945, before the three-judge court.

8. Plaintiff's suggested findings of fact and conclusions of law.
9. Defendants' suggested findings of fact and conclusions of law.
10. Opinion of Court.
11. Court's Findings of Fact and Conclusions of Law.
12. Final decree entered February 7, 1946.
13. Petition for Appeal.
14. Order Allowing Appeal.
15. Citation on Appeal.
16. Notice of appeal to plaintiff.
17. Notice of appeal to Attorney General of Delaware.
18. Assignment of Errors.
19. Statement by defendants-appellants directing attention to

paragraph 3 of Rule 12 of the Revised Rules of the Supreme Court of the United States and proof of service.

20. Order of District Judge as to exhibits.

21. This praecipe.

Dated February 27, 1945.

WENDELL BERGE,
Assistant Attorney General,
EDWARD DUMBAULD,
Special Assistant to the Attorney General,
J. J. MORRIS,
United States Attorney,
For the United States of America.
DANIEL W. KNOWLTON,
Chief Counsel,
E. M. REIDY,
Assistant Chief Counsel,
For the Interstate Commerce Commission.

179–186 [Clerk's certificate to foregoing transcript omitted in printing.]

1–2 In the District Court of the United States for the District of Delaware

Civil Action No. 579

SEATRAIN LINES, INC., PLAINTIFF

vs.

UNITED STATES OF AMERICA, DEFENDANT

WILMINGTON, DELAWARE, *July 20, 1945.*
Ten-thirty o'clock a. m. EWT.

Before Hon. JOHN BIGGS, Jr., and Hon. GERALD MCLAUGHLIN, Circuit Court Judges; Hon. PAUL LEAHY, District Court Judge.

Appearances

Ayres J. Stockly, Esq., of Hastings, Stockly & Layton, Wilbur LaRoe, Jr., Esq., of the Washington, D. C. Bar, and Parker McCollester, Esq., of the New York Bar, for the plaintiff. John J. Morris, Jr., Esq., United States District Attorney, and Edward Dumbauld, Esq., Special Assistant to the Attorney General, for the United States, and Edward M. Reidy, Esq., for the I. C. C.

3 Mr. STOCKLY. If your Honor please, I desire to move the admission of two counsel for the plaintiff in this cause, Seatrain Lines, Inc., one of whom is Mr. Wilbur LaRoe, Jr., of the

Washington Bar and the other Mr. Parker McCollester of the New York Bar.

BIGGS, J. The Court takes pleasure, gentlemen, in admitting you, and will take pleasure in hearing you.

Mr. MORRIS. If your Honors please, I would like to move the admission pro hac vice of Mr. Edward Reidy, who is assistant chief counsel for the Interstate Commerce Commission and a member of the Bar of the District of Columbia, and also the admission pro hac vice of Mr. Edward Dumbauld, Special Assistant to the Attorney General, and a member of the Bar of Pennsylvania.

BIGGS, J. Mr. Reidy and Mr. Dumbauld, the Court takes pleasare in admitting you and will take pleasure in hearing you.

Argument of Mr. LaRoe

Mr. LAROE. If it please your Honors, I should like to introduce at first the record below. I have here a list of the material in that record below for convenience of the Court, and I should like to hand a copy of it to counsel.

BIGGS, J. Just a moment, please. This record is, of course, admitted. You don't have a positive to this negative, do you?

4

Mr. LAROE. A positive to the negative?

BIGGS, J. This is in black photostat. Do you have a positive?

Mr. LAROE. Yes; I think we can get that for your Honors.

BIGGS, J. Without having it specially printed, do you have one?

Mr. LAROE. No. We would need the negative to make the positive. That is the process. The important part is we have attached to our petition in printed form the decision below of the Interstate Commerce Commission, which your Honors will find attached to our petition beginning at Page 31, and also the Commission's corrected certificate and other important documents in the record in pretty much detail are set forth in our printed petition: so I doubt whether you will have to read that difficult reproduction.

BIGGS, J. Very well.

(The record referred to was received in evidence and marked "Plaintiff's Exhibit No. 1.")

Mr. LAROE. I should like also to offer with your Honors' approval the tariffs of Seatrain Lines, Inc., which are also a part of the record, and in offering them I should like to make it clear that we do not offer them as proof of physical operations; we offer them only to the extent that they show a holding out as a common carrier by water generally.

5

BIGGS, J. Any objection?

Mr. REIDY. If they were in fact tariffs on file with the Inter-

state Commerce Commission, and on Mr. LaRoe's assurance that they were, I will accept that word and we have no objection.

Mr. LaRoe. Thank you very much. That will save time.

Mr. Dumbauld. In view of the limited offer being made for that purpose, we have no objection. We would object if they were offered generally.

(The tariffs referred to were received in evidence and marked "Plaintiff's Exhibit No. 2.")

Mr. Reidy. May I inquire if the record that was presented was the entire record before the Commission?

Mr. LaRoe. It is my understanding that it is, Mr. Reidy. Of course, if there is anything we have omitted, we will be glad to supply it.

Mr. Reidy. I have the oral argument that was made before the Commission. In view of the fact that there were some
6 concessions made at the oral argument, I would like to present that.

Mr. LaRoe. No objection.

Biggs, J. Very well.

(The record referred to was received in evidence and marked "Defendant's Exhibit No. 1.")

Mr. LaRoe. The only evidence that we shall have to introduce here that is new consists of a judicial point; namely, our reliance upon the original certificate granted by the Commission. As I read the decisions, it is necessary for us to prove that we were hurt, that property was taken away from us and that we were deprived of the property. In other words, the decisions seem to be clear that in each case of this character where we claim that a certificate or franchise was improperly revoked, we have to show that we acted on it, and I shall have five or ten minutes of testimony; but aside from that I shall have no new evidence to offer.

Biggs, J. Just let us see where we are in that? Is there any objection to that course?

Mr. Reidy. Yes, sir; your Honor, there is objection to it.

Biggs, J. Will you state it, Mr. Reidy?

Mr. Reidy. I certainly will. I will have to give you a little background:
7 The Commission got out a certificate in July 1942, in which it granted certain rights to Seatrain Lines, Inc. That was by a division of the Commission. About eighteen months later the entire Commission, feeling that perhaps they had given Seatrain Lines more authority than they were entitled to under the grandfather clause, reopened the case for further hearing. They set the case down for further hearing, but Mr. McCollester, who is Seatrain's attorney, stated very plainly on the record, and there is no dispute as to the facts, that he was

not going to introduce any evidence at that hearing before the Commission, that they were going to stand on the one legal proposition that a certificate having once issued by the Commission was good, as he later told the Commission, forever and a day.

Biggs, J. I think we see what the issue is here. Mr. Reidy, rather than pass upon this question at present, which is difficult to do until we know more about the case, we will receive the evidence subject to your motion to strike.

Mr. Reidy. All right, sir.

Mr. LaRoe. Thank you.

Now, I had thought that it might be more helpful to your Honors if I postponed the introduction of that evidence until after I have made my opening statement so that your
8 Honors will have the background.

Biggs, J. Very well.

Mr. LaRoe. I have prepared, and I should like to have handed to your Honors—perhaps it has already been—I have obtained copies of the Interstate Commerce Act in bound volumes.

Biggs, J. Very well.

Mr. LaRoe. In preparing my oral argument for this case I found so many references to the statutes, to the record, and to the chronology that I thought your Honors would be confused and I might have difficulty unless I reproduced it. So I have taken the liberty of reproducing my argument notes, a copy of which I shall hand to counsel, if it has not already been done, and also to your Honors. I think that will facilitate your Honors' understanding and my presentation.

The first is a chronology. The dates are rather important in this case, as you will see as we go along.

You will notice that we began operations to New Orleans in 1932; the Motor Carrier Act, which will receive some important emphasis by analogy, in 1935; the grandfather date in 1940. It is called the grandfather date because if you were in bona fide operation as a common carrier on that date it was mandatory on the Commission to give you common carrier
9 rights.

Biggs, J. You mean January 1, 1940, is the effective date of the grandfather clause?

Mr. LaRoe. It is the effective date of the grandfather clause. If a person could show that he was in bona fide operation as a common carrier by water on January 1, 1940, he did not have to prove anything else. He just automatically got his rights. Then in May 1940, we started our Texas City Service.

Biggs, J. Where is Texas City?

Mr. LaRoe. Texas City is practically a part of the Houston Harbor. In 1940 the Water Carrier Act itself became effective,

the grandfather date having been made retroactive in that statute.

On February 1, 1941, those carriers that did not have grandfather rights but which were prompt in filing their applications within 120 days of February first had a cloak of protection thrown around them in the sense that they might continue those operations until the Commission adjudicated their applications, but in other respects they were like any other new applicant for service. They could keep on operating.

May 28, 1941, we filed our applications which are
10 involved here for service as a common carrier, and on July 2, 1942, the Commission gave us a general common carrier certificate, a certificate as a common carrier by water of commodities generally, absolutely unrestricted except as to the ports and the routes.

In December 1943 and January 1944 the Commission reopened the proceeding for further hearing. In March we filed our motion to vacate, and in the same month the Commission had a hearing in which we appeared specially to challenge their jurisdiction to do what they proposed. In January of this year they decided the Newtex case which will be referred to in my argument.

February 6, 1945, which I also put in heavy type, because it shows when the old order was cancelled and the new certificate issued.

You will notice that the spread in time between the time we got our original certificate in July 1942 and the time that they superseded it and issued a highly restricted certificate was two and one-half years, roughly. In other words, two and a half years after we got our general grant they took away a substantial portion of it, as I shall show.

So much for the chronology which need not have further attention now.

11 Let us come now, if you will, to a definition of the issues.

On Page 3 of my argument notes I undertook to define what the issues are. The first issue is as to the essential nature of a certificate.

I ought to say, before I get into this, that this is a test case. We are blazing a trail here; a new trail. It is agreed by both sides that this whole question of the Commission's power to revoke or cancel or modify a certificate of a common carrier by water has not been clarified by the courts. We are blazing a trail in the sense that the Commission here has attempted to withdraw a part of the rights and privileges granted in the original certificate, and more particularly is it a test case to determine whether and to what extent the ICC can attach conditions to a certificate

prescribing the method of service by which the carrier shall conduct its common carrier operations.

I wish at the outset to draw as clear a distinction as I can between the certificate itself, the operation itself from New York to New Orleans or from New York to Texas City, and the routes and the ports served, the common carrier operation and the detailed service methods by which that operation shall be conducted.

12 May I illustrate because of the importance of that matter? The Interstate Commerce Commission has regulatory power over the Pennsylvania Railroad, but it can't tell that railroad whether it shall handle its oil in drums or in tanks or in tank cars. That is a matter of managerial discretion. It cannot tell the Pennsylvania Railroad whether its freight cars shall be 32 feet long or 38 feet long. That is a matter for the Pennsylvania Railroad to determine. Those matters of service, of the patrons to be served, of the method by which interchange shall be effected, the facilities used in interchange and type of cars and type of containers, all of those things the Commission has nothing to do with whatsoever. That is in the field of managerial discretion.

Now, in the field of motor carriers it is quite different. In the field of motor carriers Congress by direct statutory provision gave the Commission power over service. I will explain why they did that. It gave the Commission certain detailed power over service that the Supreme Court has held that they can tell the carrier that he may operate a six-passenger Cadillac sedan but nothing bigger in the motor carrier field.

In the water carrier field it is just like the railroad situation.

13 The words "service methods," that part of the Motor Carrier Act has been eliminated, although the Water Carrier Act was five years later. Those words as to service have been dropped out and omitted from the Water Carrier Act, with the result—and I emphasize this because I think there is no more important point in the case—this case will hinge pretty much on the extent of the Commission's power to attach service conditions as distinguished from fundamental franchise operating rights to a water carrier certificate.

Again to illustrate, can the Commission tell a water carrier with whom it may interchange freight? Can it attach a condition to a certificate saying "You may not interchange with other steamship lines"? May the Commission attach a condition to a water carrier certificate saying, "You may not handle freight that comes to your pier in a lighter at New York Harbor"? May it attach that type of conditions?

Now, there is no question, if your Honors please, about the right of the Commission to attach conditions to the exercise of the privileges granted, to the exercise of the privileges granted by the franchise such as, for example, conditions as to how the tariff shall be filed and perhaps many others within the regulatory power of the Commission. But since the statute gives them no power over service, since in that matter they stand in the same position as railroads, can they tell the carrier how large a ship it shall
14 operate or can they tell the carrier what type of container it shall operate or whether it shall interchange with lighters or not? That question we hope most earnestly will be clarified here, because that is the principal issue.

Now, that it is a test case is illustrated by the language of Commissioner Porter who had been in charge of this case for the Commission, because he said in Page 12 of the record, "There is no other party at this time that has raised the question, so it seems to me we may just as well try it out with you as anybody I know of." In other words, Commissioner Porter himself wants this whole question clarified and plaintiff is the subject on which the experiment is being tried.

LEAHY, J. Mr. LaRoe, do I understand the I. C. C. could not tell the railroad under what conditions it could accept nitrocellulose for shipment?

Mr. LAROE. No, no. I shall have to make an exception of safety regulations. Your Honor is quite correct about that. The Commission's control over safety under the explosives regulations is very complete. They can tell a carrier precisely under what conditions it shall handle those dangerous articles.

LEAHY, J. The point of my inquiry is this: Did Congress specifically grant that power?

15 Mr. LAROE. Oh, yes; in a special statute. There is no question about that. I should have made that exception, and I thank you for calling it to my attention. I had reference to the general railroad field, the size of a coal car, the question of whether they shall have a hopper car or a gondola car for handling coal. All those service methods the Commission has no jurisdiction over, with certain exceptions such as your Honor has called to my attention.

Now, to come down to specific clarification of the issues, on Page 3 of my notes:

"Is a certificate a mere license which can be revoked at will, or is it in the nature of a franchise? Plaintiff claims that a certificate granting operating rights to a common carrier by water is in the nature of a franchise, and that it is irrevocable after it has become vested.

"Collateral issue. Is a certificate an 'order' analogous to the

ordinary regulatory rate orders of the Commission, or is a certificate to be distinguished from a mere regulatory order? The Government contends that a certificate is a mere regulatory order. Plaintiff contends that it confers permanent franchise rights and is in no sense a regulatory order."

16 The Government finding that the statute is completely silent on the revocation of water carrier certificates, finding that it gives them no power to revoke at all as it does in the Motor Carrier Act, tries to rely on the fact that the statute says it may modify its orders, and so it says, "If we can modify our orders, why can't we modify a certificate?"

One of the points of my argument will be that a certificate is a franchise as distinguished from a regulatory rate order, and I shall undertake to point out to your Honors the difference.

BIGGS, J. Mr. LaRoe, assuming your position is sound and that it is a franchise, does that franchise run in perpetuity so long as the operating conditions are observed?

Mr. LAROE. Yes, sir; subject only to one condition: that the Commission may attach conditions to the exercise of the privileges—that is to say, I shall draw in my argument a clear distinction—at least, I shall try to make it clear—between the revoking of the essential grant itself, the essential franchise itself or any essential part thereof, and the attaching of conditions to the exercise. For example, I don't question the right of the Commission to say to the carrier, "Now, we will let you operate this New Orleans service, but you have to comply with all our statu-

17 tory regulations as to tariffs. We are going to impose an extra burden on you to the extent if you make any charter tariffs of a special type you must file them with us.

All such conditions within the Commission's statutory power in the exercise of the privileges the Commission may attach, but there is one thing I claim they can't do: They can't attach a condition that takes away the grant itself. That is revocation, and that power was withheld from them, as I shall show.

Now, the public need for a proposed operation versus grandfather rights for a past operation:

That I hope to make clear, because—I haven't spoken of this—our New Orleans operation was protected by grandfather rights, whereas our Texas City service operation was not protected by grandfather rights. We were about four months too late for grandfather rights as to Texas City. The Commission, we think, has made a grave administrative error to our injury by combining the two. Do your Honors not see the danger of letting the administrative agency mix up grandfather rights with a future proposed operation based only on public need, public convenience, and necessity? That is to say, there would be no progress in this

industry if applications for future service were based on the old service of the past.

Biggs, J. Let me ask you another question, Mr.
18 LaRoe: Turning to Page 4 of your trial notes——

Mr. LaRoe. Yes, sir.

Biggs, J. "The original certificate contains the following language:

"It is hereby certified that public convenience and necessity require the continuance of operations * * *."

Would the certificate under the grandfather clause have the same phraseology "That public convenience and necessity requires," and so on?

Mr. LaRoe. No; we think not.

Biggs, J. What is the practice? When the Commission issues a certificate under the grandfather provision does it use that same phraseology?

Mr. LaRoe. Yes; that is the phraseology commonly used in connection with grandfather rights.

Biggs, J. Whether it be grandfather rights or public convenience and necessity of a new operation?

Mr. LaRoe. Yes. In connection with the new operation they undertake—they have power there.

Biggs, J. I know. I am merely talking about the form of the certificate. The certificate is the same in either event, is it? The form of the certificate is the same?

Mr. LaRoe. Yes; the general form is the same, yes;
19 that is right.

Biggs, J. I am not sure that I made my point at all clear. It may be quite unimportant. I merely wanted to get it straight so that when this case is under consideration I might understand it fully.

Suppose you had not made any application at all for your Texas City operation, but had merely made a request for a certificate under the grandfather clause based on your New York-New Orleans operation, and the Commission had granted a certificate? Would that certificate have the phraseology "public convenience and necessity" or do you know?

Mr. LaRoe. Yes; the certificate will contain the phrase "public convenience and necessity require the continuance of operations by Seatrain Lines, Inc." It will have that language in it.

Biggs, J. Now it comes specifically to this question of what this order, the amended certificate, the new certificate did to you.

Mr. LaRoe. Yes, sir.

Biggs, J. The old certificate gave you the right to transport in commerce commodities generally between the two points. That

meant that you could take on board loaded freight cars or you could take on board packages or you could take on
20 board anything you wanted without their being necessarily in freight cars

Mr. LaRoe. Oh, no.

Biggs, J. No?

Mr. LaRoe. Will your Honor look just below where you have been reading from? It will be noted that the new certificate——

Biggs, J. I am talking about the old certificate, the original certificate.

Mr. LaRoe. Oh, the old certificate? Yes; absolutely. There were no restrictions at all.

Biggs, J. For example, you could move cattle, if you so desired?

Mr. LaRoe. Well, anything which a common carrier—I will have to put this limitation on it: Anything under which these published tariffs we held ourselves out, and that is almost anything in the world, to carry, we could carry; and if we did not have it in the tariffs we could file new tariffs. So the answer to your question is that under the original certificate we were a full-fledged common carrier by water of commodities generally and could handle anything.

Biggs, J. Yes, anything; whether in or without freight cars.

21 Mr. LaRoe. And in any manner.

Biggs, J. The new certificate lets you carry cargoes in bulk; liquid cargoes in bulk. That is, if you were carrying New Orleans molasses, you could bring it up in tanks.

Mr. LaRoe. Yes.

Biggs, J. And you could carry empty freight cars; but everything else, broadly speaking, you had to have in freight cars.

Mr. LaRoe. Yes; but I would like to make it clear. Your Honor is correct about that, but the limitation goes further than that, because we can't even handle it in a railroad car if it has been transferred, because the language is "transported without transfer."

Biggs, J. In other words, if the freight cars were unloaded, say, at Hoboken, and then the commodity was reloaded in freight cars——

Mr. LaRoe. We could not handle it.

Biggs, J. You could not handle it?

Mr. LaRoe. No, sir. Also notice that we cannot handle it unless we turn it over to another railroad at both ends of the haul. Will you observe there, please, where it says "received from and delivered to rail carriers at both ends of the line." Doesn't
22 that convert us into a mere bridge carrier?

Biggs, J. In other words, your view of this amended cer-

tificate is that it makes you an adjunct to railroads operating as trunk line carriers?

Mr. LaRoe. Yes, sir; it makes us a car ferry.

One of the main points of my argument will be that a few years ago the Commission conducted an elaborate investigation of Seatrain to determine what it was. It conducted extensive hearings and issued a report, and in that report it had to decide the main issue in the case which was whether we were a carry ferry or a general common carrier by water, and the finding and conclusion in that case were that we were a common carrier of commodities generally as distinguished from a car ferry.

Now, I respectfully submit to your Honors that under this provision here we go back to a car ferry.

Biggs, J. I remember that report, and the Commission did find in substance as you say. Now, has that decision bound the Commission's hands? Could it not subsequently, as any court, reverse its position? You don't have any vested right in that decision.

23 Mr. LaRoe. No, sir, we don't; but they have not reopened that case and the original certificate here was in exact harmony with that original findings. Now without getting any new evidence they reverse the original decision and give us a certificate which conflicts not only with their original certificate, but with their finding.

Biggs, J. I know, but we haven't quite come to that part of the case yet. Suppose we do come to that generally now and then you may proceed with your argument.

Mr. LaRoe. Yes, sir.

Biggs, J. First of all, have there been any pertinent decisions under the Carriers by Railroad Section, Part 1, or the old Interstate Commerce Act as to this question of franchise in a certificate?

Mr. LaRoe. The cases are very meager as to the revocation and modification of common carrier franchises. There is one railroad case which holds that where there is fraud or nonuser there can be revocation. I think it is an accurate statement, and Mr. Reidy will correct me if I am wrong, that in the whole history of Interstate Commerce regulation there has never been a case in court involving the right of the Commission to take away by conditions or otherwise a substantial part of a certificate grant in the absence of fraud or nonuser.

Biggs, J. What about the decisions of the Commission?

24 Mr. LaRoe. Oh, no; there are no such decisions that I know of. There is the Levisa Railroad case, which may be mentioned by the other side, where there was not a substantial carrying out of the franchise. That is the only case I know of.

My proposition of law is, and I think it is sound, that in the

absence of fraud or nonuser the franchise of a railroad or the franchise of a water carrier cannot be withdrawn in whole or in part after it has become vested and relied upon.

BIGGS, J. In fact, at what point does it become fixed? When it has been relied on?

Mr. LAROE. When it has been relied on.

BIGGS, J. You have to have both?

Mr. LAROE. I think the decisions are that the mere grant of a piece of paper is not enough. You have to show that you acted upon it.

LEAHY, J. If the Commission is totally without power, what would happen in this suppositious case? Suppose you got a certificate which granted you more than you actually wanted or desired? Would you say the Commission had power to modify the certificate per se in order to meet your desires on the ground that it was issued to you originally by mistake?

25 Mr. LAROE. Of course, your Honor probably knows that they claim inadvertence here, but my answer to that is that if they have conducted a careful inquiry, if they have granted franchise rights and if they granted more than they later thought they should have granted, if it was a careful exercise of administrative judgment and if there has been reliance upon it, even the Congress of the United States can't take it away.

BIGGS, J. Does the record show any certificates granted to other carriers of the type of Seatrain carriers? I use the word "Seatrain" carriers since your client has become foremost through the name.

Mr. LAROE. No; there is no case. In the first place, there is no other carrier like Seatrain in the whole coastwise or intercoastal trade. There was a little car ferry case known as the Foss case in Puget Sound where that little carrier did conduct purely a car-ferrying operation, and the Interstate Commerce Commission authorized it, I think, by a very recent decision, to continue that operation.

BIGGS, J. What is the Newtex line?

Mr. LAROE. The Newtex line is a new line, and by the way, it is of interest to us that the Newtex certificate decision was handed down within two weeks of the date that they revoked and

26 cancelled ours. They granted in that case a general certificate reading exactly like the first paragraph you read at the top of Sheet No. 4 to the Newtex line, although the Newtex line did not own a ship and although the face of the decision shows that they did not own a ship and nobody, including the Interstate Commerce Commission, knows today what type of ship Newtex Line will operate.

BIGGS, J. Where is it to operate?

Mr. LaRoe. Right alongside of us every foot of the way from New York to Houston, which is in the same harbor.

Now, at this point, since your Honor has raised it, I would like to make the point of the essential unfairness of this thing. To the Newtex Line and all of our other competitors in this trade they have granted unrestricted certificates reading exactly as per the ——

Biggs, J. That was exactly my question. Does the record show that?

Mr. LaRoe. Yes. If the record does not show it, the decision, of which you may take judicial notice, does show it, and we have for your convenience appended them as the last four documents in the material which we handed you this morning.

Let me make that clear: We compete, for example, with
27 the Bull Line operating between New York and Texas and with several other lines, with the Newtex Line which just got its new certificate. As to each one of those the certificate is wide open. Use any facilities you please; use any type of ship you wish to operate. Ours is the only one that they have restricted. Now, whether they intend to go after these others later, I don't know. If they do, it will be very serious. Are we coming to a point, your Honor, where the Interstate Commerce Commission says to the Bull Line, "You may handle your freight in automobile trailers," and, by the way, that trailer development is going to be terrific.

Are they going to say to the Pan Atlantic, "You may handle freight that comes from lighters but nothing else?" Are they going to say to Seatrain, "You may handle your freight in cars as a bridge carrier, but you must not pick up anything at New York?"

I shall show later in my argument that we can't pick up any lighterage freight at New York. I shall show you that we can't even reach our freight station on Manhattan Island under this decision.

Does the Commission have power? It certainly would be a bombshell in the water carrier industry if the Commission has power to tell these different lines of carriers how they shall conduct their operations.

28 But to answer your Honor's question more specifically, at the time that Newtex decision was issued the record in that case showed that they didn't have a boat or a ship yet, and the face of the decision shows that they don't yet have a ship, and they can buy any kind of ship that they want and operate it as they please, and that is true as to every one of our competitors.

I shall further show—and perhaps this is the time to do it, because I don't know of any more important phase of this case than a common carrier's right to pick up lighterage freight——

BIGGS, J. I am afraid you are going a little fast. Would you slow down just a bit?

Mr. LAROE. I don't know of any phase of this case that is more important than this tremendously going truck transportation field, interchange of freight between trucks and steamship lines, interchange of freight between lighters and steamship lines. I assume that your Honors know generally the importance of lighterage in New York Harbor. Do you understand that under this decision we can't depend upon any of the lighterage freight, which is so terrifically important? Do you understand that under this decision the thousands of truck lines around New York can't bring any freight to our pier?

BIGGS, J. Let me ask you this question: How much of your previous freight was received from lighters?

Mr. LAROE. Quite a substantial part. The record does not show the precise volume. We always held ourselves out to handle that freight. One case shows it was ten percent, Mr. McCollester tells me, and also I shall call to your Honor's attention another thing which I forgot to mention; namely, I suppose you would take judicial notice, and anyway the record shows it, the tariffs show it, that there are 38 foreign steamship lines coming into New York bringing such items as crude rubber from the East which we interchange with them. This record of the tariffs shows the absorptions of lighterage freight made on that traffic. Do your Honors realize that under this decision we can't interchange any of that freight with foreign steamship lines? The only way to do it is by lighter. We can't do it. We can't interchange freight with trucks either. In other words, I don't think I am exaggerating when I say that this new certificate cuts our throat. It cuts out the business that is the most important business that a carrier serving New York can handle.

BIGGS, J. I ask this question because I have sat previously in two of these cases and have some background in them: Isn't it a fact that at least in the past up to the beginning of the World War the great bulk of your business was in cars?

Mr. LAROE. Oh, absolutely. The Commission itself says in two or three different decisions that our ships were designed primarily—primarily to handle freight in railroad cars; but the fact that that has been the great preponderance of our business, which is true, I don't think ought to deny us the privilege of handling what our tariffs for ten years have told the public that we are in business for. Those tariffs that I have laid before your Honors show that we interchange with 38 steamship lines coming into New York. They show that we interchange with lighters and what we pay for the absorption of lighterage charges. Now,

if the Commission's decision is approved here by this honorable court, those tariffs go out the window.

Biggs, J. Let me ask you this further question: Aren't you in a very different position with respect to your operation between Hoboken and Belle Chasse than you are between Hoboken and Texas City? If you were in operation in this way prior to the grandfather date, why don't you have an absolute right under the grandfather clause to maintain this same traffic?

31 Mr. LaRoe. We claim that we do. In other words, we claim that under the grandfather clause we are a common carrier. The proof is that it was in bona fide operation as a common carrier on the grandfather date, and we claim that it is mandatory upon the administrative agency, because the statute says "shall issue."

The answer to your Honor's question is that we are in a different position legally as to the New Orleans situation, because as to the New Orleans situation we had grandfather rights, and we claim that it was mandatory upon the Commission to give us the full common carrier status that we had as to that operation on the grandfather date, including the lighterage interchange with other steamship companies, handling of truck freight, and so on. Why, if your Honors please, we have a station right in the heart of lower Manhattan which is not reached by rail. How are we going to serve our own station under this certificate? The whole point is that they have converted us—perhaps I have not answered your Honor's question about New Orleans. New Orleans is different from Texas City because New Orleans was a grandfather proposition.

Biggs, J. You come into Belle Chasse, don't you?

Mr. LaRoe. Belle Chasse is a subport to New Orleans. Whereas Texas City we have no grandfather rights,

32 and I wish to emphasize this point: As to Texas City we had a proposed service and we proposed that service defined in those tariffs for the future as to our Texas City operation, and the Commission gave it to us. Then after giving it to us, without any new evidence and without any evidence, not a word of evidence saying that we should be confined to railroad cars and not a word of evidence showing that the public interest demanded us not to handle lighterage freight, and not a word of evidence to show that we should not handle truck freight; they arbitrarily make a finding the equivalent of which is this:

"Inasmuch as we have determined your grandfather rights to New Orleans on this restricted basis, we also find that the public convenience and necessity for your future operations as to Texas City shall be similarly restricted."

BIGGS, J. I am not quite clear about this: A division of the Commission passed on this case?

Mr. LAROE. Division 4.

BIGGS, J. Headed by Commissioner Porter. They handed down a certificate in the first instance, which you have here on page 4, and then at a later date, approximately two years later, did the whole Commission meet or was this done by the same division?

Mr. LAROE. No. What happened was that we received
33 something in the nature of a show-cause order from the Director of the Commission's Bureau of Water Service in the form of a letter, and when the thing was finally decided it was by the full Commission and not by a division, except for the very important fact that there were some very strong dissents to which I should like to call your Honors' attention later.

BIGGS, J. Very well. I think I have interrupted you enough, and in view of the fact that we have but one Stenographer and in view of the heat of the day, I think it would be well if we had a brief recess. We will stand in recess until 11:30.

(At this point a brief recess was taken.)

BIGGS, J. Proceed, Mr. LaRoe.

Mr. LAROE. One preliminary matter, if I may. Mr. Dumbauld called my attention to something that in fairness to him I should make clear. When I handed in the official record of the Commission I incorporated as the last three or four documents in that record the decisions in the certificate cases of our competitors with the accompanying orders. I really should not have done that. I should have made those a separate exhibit for the reason that they are not part of the official record.

34 BIGGS, J. Nonetheless, I assume the Court will take judicial notice of any order of the Commission.

Mr. LAROE. The language of the statute is "The Commission may provide for such reports, and such authorized publications without further proof shall be received as competent evidence."

BIGGS, J. The question is really one of competency.

Mr. LAROE. That is correct.

Mr. DUMBAULD. The statute does cover the published reports, and I don't know whether this has been published or not, so I just wanted to make an objection for the sake of the record.

BIGGS, J. Very well, Mr. Dumbauld.

Mr. LAROE. There is one other point: When I answered your Honor Judge Biggs about the previous handling of freight in carloads, I did not do justice to my answer for the reason that whereas it is true that we handle freight primarily in railroad cars, I don't want your Honors to overlook the important addi-

tional restrictions now imposed if you add to that the fact that we have to interchange with railroad at both ends of the line, no more with lighters. In other words, as I read this order, if we handle freight, we will say, from Dallas, Texas, by rail
35 to Texas City, and then put the car on our vessel for delivery to our station in Manhattan Island, New York, I don't understand that we are permitted to handle that under this order even if it is in a railroad car unless we deliver it to our station in a railroad car. Now, we can't do that because the station is not served by railroad, and at that point will you be so kind as to look at the middle of Page 5 of my argument notes, the heavy type:

"Item No. 2335 on Page 111 of that tariff defines the delivery point in New York as follows:

"Except as noted in individual items, rates published herein to or from New York, N. Y. will apply only to or from Manhattan Terminal (New York, N. Y.) of Seatrain Lines, Inc.'"

There is our official New York station in lower Manhattan, and I submit under the terms of this restriction we can't reach it. This says that we can't transfer the freight. It says that we shall not handle freight except in a railroad car, and I interpret this to mean that a common carrier serving the Port of New York, a common carrier of commodities generally, can't reach its own station.

Now, just below that on the same page I want to give you an illustration of this lighterage business coming in from other steamship lines. We have in our tariffs the names of 38
36 steamship lines with which we connect, and those are in the tariffs that are before your Honors.

"Absorption of Lighterage Charge on Crude Rubber, Carloads.

"On import shipment of crude rubber in carloads, billed at through rates applicable from New York, N. Y., and delivered by lighter to piers of Seatrain Lines, Inc., Hoboken, N. J., Seatrain Lines, Inc. will absorb lighterage charges of 2.7 cents per 100 pounds."

I ought to point out in connection with that——

Boggs, J. I am afraid you are going a little too fast, Mr. LaRoe. Would you slow your voice down just a little bit?

Mr. LaRoe. Yes; thank you.

Leahy, J. At that point, Mr. LaRoe, is there any independent evidence in the record before us or was there any independent evidence before the Commission which supports any of the statements appearing in the tariffs?

Mr. LaRoe. Of course, we have offered the tariffs only as to holding out, but I was just about to say in answer to that question

that the very first item that we illustrate in connection with our Texas City service, when the Commission called upon us for
37 supplemental data as to what we were handling, the very first item that we showed them was this crude rubber, and that is shown in the record before the Commission and in the record before you.

Now, can I possibly be wrong that if this order sticks we have to go out of that business and cancel this tariff? How can we handle it?

Furthermore, in Exhibit J, a copy of which I should like to hand to your Honors and to counsel, Exhibit J attached to the application, if you will just read the last paragraph:

"South-bound most of the handlings are what the trade refers to as general cargo and the advantages of Seatrain for the handling of miscellaneous manufactured goods are well known. Specifically the service has been helpful in connection with shipments of machinery and of large and heavy cylinders for the oil industry which ordinary steamers cannot handle and which, in many cases, will not clear on the railroads' right-of-way."

Now, Commissioner Patterson of the I. C. C., who is quite a railroad expert because he was formerly head of their Bureau of Safety, asked at the oral argument "Isn't it true that long steel girders and things like that often can't be handled in one railroad car?"

When we do handle railroad cars we put them on an elevator one at a time. Now, suppose we have a steel girder
38 as long as this room. It won't go on a railroad car.

This record talks about pressure tanks that are too large for the railroad car. Are we, one of the largest and strongest steamship lines entering New York Harbor, to be told we can't handle it? Our tariffs have for years held ourselves out to handle it. One of the letters in this record from a large company, the Kellogg Company, asks specifically that we handle their large pressure tanks because they are too big for a railroad. I submit that all of that material and all of the truck material and all the lighterage material is out, and therefore I think my client's language is appropriate that our throat is cut.

BIGGS, J. On the Seatrain's ships there are a number of decks, of course, for cars and they have this elevator arrangement?

Mr. LAROE. Yes.

BIGGS, J. Do they have general holds?

Mr. LAROE. They don't have general holds, but they have a large amount of deck space. They have other space between cars. They have ample room for the handling of other commodities on the boats; otherwise there would be no purpose of our being here.

Now, as to the explanation of the statute, I don't know how much your Honors want me to go into Page 6, the details of the statute, but there are a few things there that I think will be helpful to your Honors.

What is known as the "grandfather" clause reads as follows:

"Provided, however, that * * * if any such carrier * * * was in bona fide operation as a common carrier by water on January 1, 1940, over the route or routes between the ports * * * and has so operated since * * * the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for a certificate is duly made."

I call your attention to the mandatory character of that. Now, can I be wrong about the proposition that if we were a general or common carrier of all of this material on the grandfather date that we were entitled to continue to be a common carrier of such material? Please note that nothing is said in this about the method of doing business, about the kind of facilities, about whether the service is good or bad. All it says is "If you can prove that you are a bona fide common carrier, no matter how insufficient you were on the grandfather date, no matter what kind of facilities you used, you shall be entitled to a common carrier certificate without any proof whatever of the public need."

LEAHY, J. The point is that the franchise was given by Congress and not the Commission.

Mr. LAROE. That is correct. The franchise was granted by Congress and not by the Commission. It is a legislative proposition.

If you will be so good as to turn to Page 7, the terms that the Commission may attach to a certificate—before reading some of that I would like to say by way of preface that the issue here relates to the kinds of conditions that the Commission may attach. Frankly admitting that the Commission has the power to attach reasonable terms and conditions to the exercise of the privileges granted by such certificate, it cannot go so far as to prevent a carrier from adding to the service that it gives to shippers. If you will be so good as to notice the language in Paragraph (d).

BIGGS, J. Could it go so far, you say, as to add conditions which might prevent the carrier from adding to the service to shippers? I don't quite catch the significance.

Mr. LAROE. I was unfortunate in my language. Let me try once again. I can clarify it if I read the proviso in the middle of the paragraph:

41 "Provided, however, that no terms, conditions, or limitations shall restrict the right of the carrier to add to its equipment, facilities, or service * * *."

Now, may I give you an illustration of how this certificate as corrected by the I. C. C. violates that? In New Orleans these tariffs show that we make the equivalent of store-door delivery.

BIGGS, J. Store-door delivery?

Mr. LAROE. Store-door delivery by truck. We won't operate the trucks ourselves, but we pay the equivalent of what it costs to get it to store-door, and these tariffs show that the whole New Orleans switching district is on that basis. By the way, I did not quite answer your Honor correctly this morning. Belle Chasse is not a subport.

BIGGS, J. It is fourteen miles away from New Orleans.

Mr. LAROE. Yes; it is a part of the port.

Now, on this crucial point here, let us suppose that the Newtex Line decides to give store-door delivery in New York just like the store-door delivery in New Orleans. They have a right to do that, to employ a truck to make delivery on Manhattan Island. Any carrier has that right and railroads do that, as you know.

BIGGS, J. Let me interrupt. I am afraid I am not
42 quite grasping it. You make store-door delivery in New Orleans by engaging a truck line to make delivery for you. Is that as your agent?

Mr. LAROE. No. Your Honor has not quite stated it. As I understand, what we do under these tariffs, we pay the allowance to the shipper, and he does it.

BIGGS, J. He does it?

Mr. LAROE. He does it.

BIGGS, J. Are you prohibited from doing that under this order?

Mr. LAROE. I think so, because this says that we have to deliver the car to a railroad.

BIGGS, J. I see. In other words, it affirmatively directs your delivery to a railroad and therefore it can't be delivered to a truck.

Mr. LAROE. I hope that I made the point that this threatens to ruin our port business. This order makes us a pure bridge carrier of overhead traffic.

BIGGS, J. I did not get the last word.

Mr. LAROE. Overhead traffic. Overhead traffic moving through the ports and handled by railroads at both ends of the line. I don't read this order as meaning that we can take a ship-
43 ment of steel from Buffalo, New York, in a railroad car and haul it through New York Harbor in our vessels in a railroad car and give store-door delivery of it in New Orleans even if the shipper operates the truck.

BIGGS, J. Supposing it were consigned to New Orleans?

Mr. LAROE. That is what I am talking about. We can't handle that because this condition here, if you read it, says "received from and delivered to railroads." We can't even deliver to a shipper. Whoever heard of a common carrier who can't even deliver to his own shipper or consignee.

BIGGS, J. Let me ask this question: Your ships, of course, come in at Belle Chasse, which is thirteen or fourteen miles away from New Orleans. Now, whether or not that be New Orleans, it is called the Port of New Orleans. They are there, and these cars are taken from the ship by your little elevator arrangement and are put down on a railroad, the name of which I forget for the moment, but isn't it the New Orleans Terminal Railroad?

Mr. LAROE. Yes; the New Orleans and Lower Coast.

BIGGS, J. That railroad moves the cars into New Orleans proper—that is, we will say to the X steel plant or to the X plant where a steel ship is to be built. Do you understand that
44 under the terms of this order that steel could not be delivered in New Orleans except by railroad?

Mr. LAROE. That is the way I understand it.

BIGGS, J. In other words, it could be delivered there by railroad but only by railroad?

Mr. LAROE. Only by railroad. In other words, if there is any transfer at all anywhere in that process or if it is delivered to a shipper or to a lighter or to a truck as distinguished from another railroad delivery, we can't handle it.

May I carry the illustration one step forward, because so far as our future operation is concerned this matter is our very life blood or part of it? Suppose the Newtex Line should give store-door delivery on Manhattan Island and the other steamship lines should do so also, the lines with which we compete? We might just as well go out of business.

BIGGS, J. Suppose you had a shipment of steel from some point inside New Jersey in cars, small steel in cars taken by your Seatrain vessels to Belle Chasse, taken from there on the New Orleans and Lower Coast Railroad into New Orleans and there was no plant delivery by railroad; there could be none. Would you say that you would not be able to have the steel delivered by truck from the terminal of the New Orleans and Lower Coast Railroad?

Mr. LAROE. That may raise a question. I don't think
45 we could, because this says "without transfer." Perhaps I could make it a little clearer if you refer to Texas City where I understand there is no such rail line. There if we want to pay the shipper or the consignee three cents a hundred pounds or sixty cents a ton for using his own truck to deliver in lieu of railroad delivery which our tariffs at New Orleans hold ourselves out to

do, and I think we have a similar provision at Texas City, I don't see why as a general common carrier by water we can't do what all the other steamship lines are already doing.

BIGGS, J. But you think you can't under this?

Mr. LAROE. We can't do it. I know we can't do it because this says that we can't use truck delivery. The language that compels that is at the top of Page 4. This is the language which compels that:

"* * * of property loaded in railroad cars received from and delivered to rail carriers * * *."

Now, suppose you deliver to a truck or to a lighter? You just can't do it under the terms of this order.

LEAHY, J. Well, there is also the converse: Suppose a truck is there ready to load the empty car for the return journey?

Mr. LAROE. Suppose when our ship starts out from
46 Texas City that lying on the dock are a hundred drums of molasses for delivery in Manhattan Island or in the Manhattan district? There are a hundred drums which the truck has just unloaded at that pier. We want to bring those drums to New York on our vessel. We are clearly competent to do it. Our tariffs say we will do it. We look at those drums and we read this order and we can't touch them, although we are a general common carrier and have been for over a decade. The Newtex Line can pick them up, but we can't.

BIGGS, J. You were on the subject of conditions, Mr. LaRoe. You would concede that the Commission might from time to time impose conditions for operation which were within the purview of the service required by the certificate, but they could not impose limitations or conditions which, in effect, would render the certificate substantially inoperative. Isn't that your whole point?

Mr. LAROE. I think you have stated my position almost identically with the way I would state it myself. The Commission has undoubted power to attach conditions and limitations to what? Please get this point, as indicated in Paragraph (d) on Page 7: The Commission may impose reasonable terms, conditions, and limitations to the exercise of the privileges granted. I
47 don't want to be technical, but isn't there a tremendous difference legally between impairing a certificate, taking the grant itself away, and attaching conditions and limitations to the exercise of the privileges which are granted? We have got to leave the privileges and rights there. You can attach conditions as to how they shall be exercised, conditions to the exercise of the privileges, but you can't take away the grant itself. It is not taking away a part of the grant itself when they say we can't serve our own shippers as a common carrier by truck as the other carriers do? Isn't it taking away a part of the grant when they

convert us into a mere bridge carrier with railroad service at both ends of the line? I shall not labor that point because it seems so clear.

Now, if you will be so good as to glance at Page 8, that says, first, grandfather rights were not involved, the only issue being whether the public interest required the service proposed by applicant. I repeat that the service proposed was the service as defined in the tariffs which were made part of our application, and that included this lighterage and everything else.

Second, applicant's proposal——

Biggs, J. I don't think you need read all this. We have
48 it before us and we will examine it carefully. Can't you sum up your New York-Texas City issue? Of course, it appears that that is where you are actually applying for a certificate of public convenience and necessity.

Mr. LaRoe. There are only two points, then, to summarize, and they are in 5 and 6; namely, that nobody objected to the full certificate which we got, not even our competitors, because they had the same type of certificate. The Commission put these severe restrictions on us without anybody asking for them, just on their own whim or desire.

Second, in No. 6, that the Commission, because of a change of policy or of administrative judgment reopened the matter, claiming inadvertence, and imposed restrictions as to the service methods by which plaintiff might conduct its common carrier operation, New York to Texas City, and in doing so imposed what it erroneously deemed to be the service methods incident to the grandfather rights New York-New Orleans.

Now, I should like to develop, with your permission, just one thought there:

Let us suppose, and I understand this to be a fact, that the Commission erroneously decided as to New Orleans that we should be restricted so we could not touch New York lighterage traffic.

I claim when they came to Texas City dealing not with
49 grandfather rights then, but public convenience only for the future and the need of the public for service, I claim that they should have made an administrative finding as to whether or not the public needed the restriction which they imposed. I concede their right legally to impose restrictions which do not take away the grant itself and which are justified by the evidence; but I emphasize this point: That the mere fact that they made a limitation on our grandfather rights as to New Orleans does not ipso facto mean that the future public convenience and necessity as to Texas City requires the same unreasonable limitation. They compounded the error. They compounded the error by first making

an undue and unfair restriction of our grandfather rights to New Orleans saying——

Biggs, J. Your point is that they based their public convenience and necessity or lack of it in the Texas situation on the New Orleans picture and did not make a separate and distinct finding in respect to Texas City?

Mr. LaRoe. Your Honor is correct, except that I would like to put the emphasis just a little bit differently, because I think the difference in emphasis is important. I don't see how there can be any progress in the steamship industry if grandfather rights are to determine your methods of future service. In other words, if all future service is to be judged by past grandfather rights
50 and past methods of doing operation, where is there any room for carrying out this clause in the statute: "Provided, however, that no terms, conditions, or limitations shall restrict the right of the carrier to add to its * * * service * * *"

I claim that it is an administrative error in deciding when a carrier comes in and says, "Here is the service we offer, the service in these tariffs," and I say it is an administrative error, and error of the law, for the I. C. C. to say, "We are not going to inquire into that matter; we are going to take what we think was your old New Orleans grandfather rights and fasten those for the future on your Texas City service."

Biggs, J. What section is that subparagraph (d)?

Mr. LaRoe. It is on page 7.

Biggs, J. What section is it?

Mr. LaRoe. Section 309 (d). You will find it at Page 173 if your copy is the same as mine.

Biggs, J. Yes. Now, that is the public certificate. That is not the grandfather part.

Mr. LaRoe. No; this is the public certificate part.

I don't want to labor this point unduly, but I claim if the Commission did in every case what it has done here; namely, used
51 grandfather rights as the measure of future operation, well, then, all future services would be limited to the old services and there could not be any progress.

I am going to skip, if I may, over to Page 11.

It is highly significant that the Interstate Commerce Act——

Biggs, J. Mr. LaRoe, please don't read this. We can read it.

Mr. LaRoe. I don't propose to read it, your Honor.

Well, the Interstate Commerce Act gives the Commission complete power to revoke the motor carrier certificate. It does not do it either as to rail or water.

I don't want to read all this and I am not going to, because the

time is getting short; but I do want to get this point to your Honors:

When the Commission appeared before Congress when this bill was pending they asked the Congress not to give them the power of revocation, and I want to read to you, if I may, the paragraph entitled "House Bill," because that is Commissioner Eastman's statement to the Congressional Committee:

"This bill leaves section 212 (a) unchanges, and has no corresponding provision in the new part III. While there is room for argument, we are inclined to believe that provision for the
52 revocation or suspension of water carrier certificates or permits is not essential, if adequate penalty provisions are provided for violations of part III. Revocation or suspension, in the case of motor carriers, is believed to be the most effective means of enforcement, since there are so many such carriers, and the operations of the great majority are so small, that enforcement through penal actions in courts presents many practical difficulties; but this should not be true of water carriers."

Now, they knew that they did not need that power as to water carriers. We have only four or five competitors, common carrier competitors between New York and New Orleans. It is quite different from a hundred thousand motor carriers to regulate. They claim here today, the Interstate Commerce Commission when it argues here today will make an argument, if they follow the decision, to the effect that they can spell out the power to revoke from other section of the Act, and the point I am making here is that in the Motor Carrier Act they gave them the power to revoke and in the Water Carrier Act they did not give it to them because they said they did not want it, and yet they are still trying to spell it out.

Biggs, J. The Commission claims here that they issued the original certificate through inadvertence. Leave out any question of grandfather rights at all and consider it as a
53 de novo certificate. Now, as to inadvertence, the Commission went too far and granted more rights than it intended to grant. Whether or not they have the power to cancel the certificate or the franchise or whatever we choose to call it, isn't it well established that any tribunal may correct the result of its own error?

Mr. LaRoe. I go into that point rather fully on Page 17. If you would like me to cover it now——

Biggs, J. Suppose you come to that point.

Mr. LaRoe. Now?

Biggs, J. Now if you would, and then you can go back to the other.

Mr. LaRoe. In the first place, I want to draw the distinction,

and if you will permit me to, it bears on the point, I would like to refer to the top of Page 12: The Commission here claims that it can do that very thing because a clause in Section 315 (c) says, "The Commission may suspend, modify, or set aside its orders under this part upon such notice and in such a manner as it shall deem proper." They try to spell out the power of modification of a certificate from that. Now, that they just cannot do. This is not a regulatory order. This is a franchise. Do your Honors not see the distinction between a rate order fixing the rate
54 on sardines from Spokane to Washington in the future and a franchise? This refers to orders as distinguished from certificates, and I say that because the word "order" is not used anywhere in the certificate part of the Act. I grant you that they have power to modify their regulatory orders, but where the power to revoke is so carefully withheld they can't spell it out.

LEAHY, J. Suppose for the purpose of discussion there was an error or inadvertence, would you say they had not the right to bring plenary action themselves in equity to cancel the certificate on the ground that it was issued by mistake?

Mr. LAROE. That depends. It is a difficult question to answer, your Honor. But suppose they had issued in a given case certain rights to serve New York which they had not intended to grant, and the carrier had gone along and spent six million dollars in a New York terminal and had relied upon and acted in reliance upon it so that it became a vested right? The cases are pretty clear that where they carefully exercised their administrative judgment in that manner they can't come back after the right has become vested and take it away. I cover that rather fully.

LEAHY, J. That is the point Judge Biggs asked earlier this morning. At what point in time does it become
55 vested?

Mr. LAROE. Well, that is a matter for judicial determination. It becomes vested when there is substantial reliance on it, which we shall abundantly prove by my witness.

BIGGS, J. Mr. LaRoe, coming back to Section 315 (c)——

Mr. LAROE. Yes, sir.

BIGGS, J. It says that the Commission may suspend, modify, or set aside its orders under this part.

Mr. LAROE. That is right.

BIGGS, J. That means Part III?

Mr. LAROE. That is right.

BIGGS, J. It does not limit it simply to regulatory orders.

Mr. LAROE. That is right.

BIGGS, J. How do you escape the effects of that language?

Mr. LAROE. I escape it this way: There is a legal distinction

between a regulatory order and a certificate. A certificate is not an order at all. A certificate is a franchise and not a regulatory order. In the whole portion of the Act relating to certificates there is no word about suspending or revoking them. The only part there, you recall, is about the kinds of conditions they
56 may attach to the exercise of the privilege.

BIGGS, J. When the Commission grants a certificate they do it by order.

Mr. LAROE. They have fallen into that habit, but they don't have to do it.

BIGGS, J. How long have they done it?

Mr. LAROE. Ever since the practice was first inaugurated, but I think that their form of doing it is not legally the controlling thing. The controlling thing is the essential nature of the grant, and if it be a franchise you can't convert it into a regulatory order by calling it an order.

In spite of the fact that the Motor Carrier Act specifically gives the power to revoke, and in spite of the fact that the Commission told Congress not to give them the power to revoke, they now try to stretch this to be the power to revoke, and I don't think it can be so stretched.

BIGGS, J. You have given Commissioner Eastman's statement. Is there anything in the report of the Committees of Congress with respect to this particular aspect?

Mr. LAROE. I don't think there is. I think they just acted on his statement.

BIGGS, J. Have you examined the Committee reports?

Mr. LAROE. I have. The Committee report does not
57 discuss that matter. The statute just withholds the grant.

BIGGS, J. Come specifically to the question, if you will, Mr. LaRoe, of the business of franchise.

Mr. LAROE. Yes, sir.

BIGGS, J. What is a franchise? A franchise at common law was the right granted by the sovereign to do a certain act or certain acts. Is it your thought that you are coming into the Dartmouth College case?

Mr. LAROE. Not quite the Dartmouth College case, but awfully close to it. May I read to you what we are coming into on Page 23 since you have asked the question? I have no objection at all to taking up that part now, and I would rather follow your thinking than mine.

BIGGS, J. You appreciate that this is not a matter that can be disposed of without a careful consideration of the whole picture. I think it may be more useful to us if we get the points of contention in mind rather than attempt to solve them expeditiously here on the Bench. Go ahead, sir. Page 23?

Mr. LaRoe. On Page 23 in the middle of the page: "A franchise is a grant by or under the authority of government, conferring a special and usually a permanent right to do an
58 act, or a series of acts; of public concern, and, when accepted, it becomes a contract and is irrevocable, unless the right to revoke is expressly reserved."

Leahy, J. But the contract clause is only a limitation on a state. That is the Dartmouth College case.

Mr. LaRoe. I know, but we are coming to the Fifth Amendment. You are right about that. The Fifth is here rather than the Fourteenth. "The right in question is not a license, because it is neither temporary nor personal * * *"

In the Frost case, it deals with a cotton gin, and you would not think a cotton gin would hold a franchise, but there are circumstances under which it can. "Specifically, the foregoing authorities establish that the right to supply gas or water to a municipality and its inhabitants, the right to carry on the business of a telephone system, to operate a railroad, a street railway, city waterworks or gas works, to build a bridge, operate a ferry, and to collect tolls therefor, are franchises."

Biggs, J. Is there any definition of "certificate" in the Act at all?

Mr. LaRoe. No, sir.

"And these are but illustrations of a more comprehensive list, from which it is difficult, upon any conceivable ground, to
59 exclude a cotton gin." How about a common carrier by water? "declared by state to be a public utility engaged in a public business, the operation of which is precluded without a permit from a state governmental agency, and which is subject to the same authority as that exercised over transportation and transmission companies in respect to rates, charges, and regulations."

Then there is a notation of what the I. C. C. says itself:

"The existence of a certificate creates a vested motor-carrier status which stays in force and effect for the life of the certificate."

Biggs, J. For the life of the certificate?

Mr. LaRoe. Yes, sir. Usually it is not covered by a period of years, and that means that it is permanent.

Biggs, J. Was there a life to the certificate in the Quaker City Bus case?

Mr. LaRoe. I think that was not limited as to time.

Biggs, J. I can check it.

Mr. LaRoe. "After issuance of a certificate the holder thereof must be accorded the opportunity of complying with all the terms of the certificate before the vested right can be revoked."

And notice what they said in the Smith Brothers case,
60 which is very important:

"In our opinion, the language of the foregoing section is clear and definite and unmistakably shows that Congress intended that a certificate, once effective, may be terminated by us only on the conditions, and according to the procedure, therein specifically provided. We may issue decision upon decision, and order upon order, on an application for a certificate so long as sufficient reason therefor appears and until all controversy is determined, but once a certificate, duly and regularly issued, becomes effective, our authority to terminate it is expressly marked off and limited."

Now, they are talking there about the Motor Carrier Act which gives them the power to revoke. How about a statute which does not give them that power?

Similarly in the Owensboro case dealing with the franchise rights of a telephone company, the Supreme Court said:

"When that grant was accepted and acted upon by the grantee it became a contract between the city and the telephone company, which could not be revoked or repealed, unless the power to repeal was clearly and unmistakably reserved."

Where is there anywhere in this statute or in the order a proviso for the revocation of a grant?

I did not answer a question which your Honor asked
61 me about inadvertence, and that is covered on Sheet No. 17. May I take that up next, unless your Honors have something else?

BIGGS, J. Certainly.

Mr. LAROE. There just was no inadvertence here.

BIGGS, J. But the Commission recites there was.

Mr. LAROE. I know it, and that claim is vigorously disputed by two dissenting Commissioners, and I don't see how it can be possible or true that there was. May I explain that we filled out all of their forms and we supplied all the information they wanted, including supplemental data. They sent investigators to our office to get additional facts. They had all these cases before them. Your Honor Judge Biggs knows a great deal about Seatrain because of your cases.

BIGGS, J. I really don't. Let me ask you this question which may bring the matter to a head: Inadvertent acts, no matter how careful they are, sometimes can be quite embarrassing, and no one who has sat on the Bench even for the limited time that I have could help but realize that quite inadvertently a court will make an order which it should not make. For example, it may dismiss and order its mandate sent down despite the fact the Supreme Court has granted certiorari—something of that sort. In-

62 advertencies do happen. Now, here the Commission says that this was inadvertent.

Mr. LaRoe. Will you permit me to answer the Commission on that?

Biggs, J. Yes.

Mr. LaRoe. The first answer to the Commission is that the certificate which they granted to us in 1942 was precisely in the same form as all the certificates they were granting to everybody else. That tends to dispel the idea of inadvertence, and if I may read to you the bottom of Page 17 where Commissioner Lee says, "When these findings were made, and the certificate issued pursuant thereto, division 4 obviously was fully informed with respect to Seatrain's operations. It was then the practice of the division, upon appropriate applications therefor, to issue certificates authorizing transportation of commodities generally to common carriers by water which had been transporting a number of commodities on and since January 1, 1940, or which established that public convenience and necessity required such transportation."

Biggs, J. Mr. LaRoe, let me put this very bluntly, and without any reflection on the Commission I am merely asking this question, and consider it in vacuo, if you please.

Mr. LaRoe. Yes.

63 Biggs, J. The court says—we will make it a court—"We issued a certain order inadvertently. The judge that signed the order had drafted an order and had handed it down despite the fact he did not intend to and intended to hand down another order of different effect." That is what the court itself says. Now, unless the court be accused of bad faith or something closely analogous to it, how can a reviewing tribunal insist that you did not do that inadvertently? Of course, you might have a contention or something to the effect that "I did not do this inadvertently; I did it intentionally, and when I say 'inadvertently' I really don't mean it." But barring something very extreme like that, how does the reviewing tribunal touch such a situation?

Mr. LaRoe. I think you can touch it. I dislike as much as anybody does to cast any reflection on the Interstate Commerce Commission for which I have the very highest regard. I know of no Government agency for which I have a higher respect, but I do think, in all fairness, that there was a change in their administrative policy in this sense: that at the time they issued this certificate they were granting the same kind of certificate to everybody. All they asked when they asked us to fill out their questionnaire was "Did you operate between certain ports and over certain routes?"

They did not even ask us what type of ships we operated.

64 There was no place to fill that out. They did ask us how many ships we own, but did not ask us to describe them, and

that was the same type of thing they asked everybody, and they issued the same type of certificate to everybody just as they did to the Newtex Line within two weeks of our own revocation. I say, with all respect to the Commission, that if they were granting that type of certificate to everybody, including Newtex, which did not even have a ship, and if later they began to test their power to impose service restrictions on carriers, and as part of the change in policy—notice the language of Commissioner Lee: "It was then the practice of the division, upon appropriate applications therefor, to issue certificates authorizing transportation of commodities generally to common carriers by water * * *." That was the practice. If that was the general practice the claim of inadvertence looks a little bit strange, and especially since they won't even let us handle lighterage freight or truck freight.

BIGGS, J. What would you have this Court do? Would you have this Court declare that the Commission made a deliberate misstatement when it claimed inadvertence?

Mr. LAROE. No; I would not ask you to handle the question of inadvertence. I am simply answering their claim that it was inadvertence, because it looks awfully strange that it was inadvertence when it is the same thing that they were doing with everybody else.

65

BIGGS, J. But you claim that it was not inadvertence; that it was deliberate?

Mr. LAROE. I do.

BIGGS, J. How are we going to determine that or deal with it unless we actually deal with it?

Mr. LAROE. I think you can deal with it by dealing with the other points in the case, the extent of their jurisdiction. I don't like to accuse them of being not absolutely frank in this matter, but two of the dissenting Commissioners have spared no words in condemning their lack of frankness in that matter.

Mr. McCollester reminds me that if they then understood the record why did they set it down for further hearing to get additional information which would justify the action they proposed to take? And on that point I would like to explain why we did not offer evidence at that later hearing.

We are accused of not cooperating as we should when they served upon us an order to show cause to the effect that we could not handle lighterage freight, could not handle truck freight and we could not even serve our own station on Manhattan Island. All we could do would be a bridge carrier between railroads.

66

We said, "This is very serious." It shocked us and counsel had to decide whether evidence would be introduced. If it was mere inadvertence we did not see why they wanted more evidence, and so we appeared specially at that hearing and we said, "You

gave us a franchise and you gave us rights upon which we have relied, and we must challenge your jurisdiction to do this before we introduce any evidence."

BIGGS, J. How long has your Manhattan terminal been in existence?

Mr. LAROE. For years. Ever since we had a steamship line.

BIGGS, J. And you began operations in 1932, didn't you?

Mr. LAROE. That is right.

LEAHY, J. In any of these other matters which had been before the Commission, references to which are in the opinion of the Commission, were the minutiae of your method of operation brought to the attention of the Commission?

Mr. LAROE. Oh, in great detail. They have all this business about lighterage, I could quote here today from their own Hoboken Division's case where they mention this lighterage business. They talk about all that material.

BIGGS, J. That case is cited, is it not?

67 Mr. LAROE. Oh, yes; I quote it in these notes somewhere. But I would like to call your Honors' attention to the bottom of page 18 in italics where Commissioner Alldredge in discussing this point says, "* * * the findings were not the result of inadvertence or oversight, but were the products of a deliberate exercise of judgment."

Now, I don't wish to labor that point any more, because I don't base my main case on that phase of the case. I would like to refer to page 20, because that seems to be the nub of the opposition's case. They want to preserve our place in the transportation system.

BIGGS, J. You think what they really mean is they want to keep you in that particular place?

Mr. LAROE. That is right. They want to keep us in a particular place in the transportation system. Now, the trouble with that argument is what they are doing is completely altering our status as a common carrier of commodities generally.

"Throughout the past decade and down to the time when its vessels were requisitioned plaintiff was a common carrier of commodities generally, handling freight by lighter when it saw
68 fit, reaching its own freight stations by truck, interchanging freight with other steamship lines by lighter, holding itself out to absorb the lighterage charges when lighterage delivery was made to it by other carriers, and engaging substantially in port-to-port business. The brief contains ample support for this statement."

BIGGS, J. I think you have covered that point on your memorandum.

Mr. LAROE. Very well.

BIGGS, J. Is there anything else to be added? We will, of course, give you some time for rebuttal.

Mr. LAROE. Not very much. I do want to make one or two points before I close the opening part of my case, if I may.

I concede the Commission's right to impose certain limitations in connection with the franchise; for example, if the carrier is a contract carrier only, I concede the Commission's right to hold it to contract operations; if the carrier has operated only between certain ports, the same; if the carrier has handled only two commoditities and is a common carrier of only two commodities, I concede their right to impose that limitation. But when they came to a case where the carrier had handled seventeen commodities, the Carolina case, the Commission said, "We will let you
69 handle only those seventeen," and the Supreme Court said to the Commission, "*You have not been liberal* enough, because when they have handled seventeen commodities they are a general common carrier and you must let them handle everything."

In other words, the point is reached in there somewhere when you become a common carrier generally. There is no question that we have handled thousands of commodities and our status is that of a common carrier generally, and the common carrier status can't be taken away from us; and when I say "common carrier status" I mean the right to serve our shippers, I mean the right to pick up freight from our shippers as we please at the points named in our certificate.

BIGGS, J. Let me ask this question: Aside from shipments in cars, that is, shipments put on by truck and by lighter, but not in cars, have you literally handled thousands of commodities?

Mr. LAROE. By that method?

BIGGS, J. Yes. Not by car and not by carload or by lifting a car from the track to the deck of a seatrain. Have you handled many commodities?

Mr. LAROE. Oh, yes. I don't know what that ten percent figure consists of.

BIGGS, J. Does the record show what it consists of?

70 Mr. LAROE. I don't think it does. I know it includes crude rubber, but I don't recall the others.

BIGGS, J. Then how do we reach this question?

Mr. LAROE. Here is the way you reach the question: I think it is a mistake for your Honors to even approach the question from the standpoint of the carrier's method of conducting its common carrier operation. I was just coming to that point, because I did not reach it in my opening statement, and if you will glance, please, at Sheet No. 15, which is the last point I want to make in opening—

I am not going to read all that, but I do want to remind your Honors that the Motor Carrier Act, near the bottom of that page, says:

"Any certificate issued under section 206 or 207 shall specify the service to be rendered and the routes over which * * *."

Now, they left that out of the Water Carrier Act.

BIGGS, J. Let me ask you this question, which will probably conclude my inquiry on this subject:

The certificate was amended so that you could carry liquids in containers and certain other modifications were made which limited you obviously a good deal, but how are you going to demonstrate or how did you demonstrate to the Commission and how do
71 we have before us in this record the fact that you are damaged if we don't know what other things you were going to carry?

Mr. LAROE. Everything. *In other words, let us take our proposed* service to Texas City, Texas, where no grandfather rights were involved at all and where all we were offering——

BIGGS, J. But you offered these tariffs only to a very limited degree. You offer these tariffs not to show the commodities that you were carrying, but that you were actually in operation.

Mr. LAROE. No. You will pardon me, your Honor, if I correct you.

BIGGS, J. Yes; you state it.

Mr. LAROE. What we are offering these tariffs for is to show the nature of our holding out and of our proposal to the Commission. When we filed our Texas City application instead of defining in detail what our common carrier operation would be, we mentioned these tariffs as defining——

BIGGS, J. What about your grandfather application?

Mr. LAROE. The same thing, and so I claim that it is error in law for the Commission to try to tell us whether we should handle our terminal operation by lighter, by truck, or by railroad car.
72 If we do have the status of a general common carrier we have a right to handle it any way we please. They are taking part of the common carrier grant away from us. We can't even reach our own station.

BIGGS, J. I grasp all that. I don't think it is necessary to go through that again. You think your record is sufficient to cover the points that you raised, though you do want to offer some testimony?

Mr. LAROE. Yes, sir.

BIGGS, J. Suppose we come now to the testimony, unless there is something else you want to discuss.

Mr. LAROE. All right. I will be very glad to save the rest for rebuttal.

LEAHY, J. Before you do that, will you clear a matter up for me?

Mr. LAROE. Yes.

LEAHY, J. You stated that the Commission failed to make any specific finding with respect to the Texas City route.

Mr. LAROE. Not quite that. They did make a finding as to the Texas City route, but they confused it with the New Orleans.

LEAHY, J. How are going to handle that situation?

73 Mr. LAROE. Let me put it this way so that it will be clear in your Honor's mind:

They first issued us a general certificate covering Texas City in which they said we were entitled to be a common carrier of commodities generally between New York and Texas City. That was in exact conformity with their finding. Later they made a corrective certificate in which they said, in effect, that we could not handle freight by lighter. There was no such evidence as to Texas City to justify that order or any finding to justify it. Should they not have said, if they were going to do that, "We find as to Texas City, which is a proposed service, that the public convenience and necessity does not require that plaintiff handle traffic by lighter"? And by that I don't mean to concede that they have a right to do that. But there is no finding to support their restriction of the Texas City service, and in the absence of a finding like they should have made, they use the grandfather rights to New Orleans and they stand on that. Now, that is error.

LEAHY, J. Thank you.

Mr. LAROE. May I call Mr. Brush?

BIGGS, J. Yes; call your witness.

74 GRAHAM M. BRUSH, called as a witness on the part and behalf of the plaintiff, having been duly sworn, testified as follows:

BIGGS, J. We understand that you have an objection, Mr. Dumbauld?

Mr. DUMBAULD. Yes, your Honor.

BIGGS, J. At the close of the testimony after you have cross-examined, which you may do without waiving any of your rights, a motion to strike will stand and will be passed upon by the Court. Proceed.

Direct examination by Mr. LAROE:

Q. Mr. Brush, will you please give your full name and the position which you hold with the plaintiff?

A. My name is Graham M. Brush and I am president of the plaintiff, Seatrain Lines, Inc.

Q. How long have you held that position?

A. I have held that position since the corporation was organized in 1931.

Q. What are your duties other than the customary duties of president?

75 A. In addition to the duties of president I have had charge in connection with Seatrain Lines, Inc. and its predecessor company, of which I was president, of all engineering and financing, and direct charge of the operation.

Q. Have you had any experience in shipping or engineering other than that with Seatrain?

A. I am a graduate of Sheffield Scientific School, Yale University, in mechanical engineering, and after the last war was assistant to the president of the New York-Cuba Mail Steamship Company, a line which operated between the United States and Cuban and Mexican ports.

In 1925 I resigned that position and spent seven years in study and investigation and research in connection with the development of the so-called seatrain type of vessel.

Q. In April 1944 you made a statement under oath in the form of an affidavit which you submitted to the Commission in this case that your company had reacquired five vessels which had been requisitioned for war use by the Government, four of which had been formerly operated on these routes under the certificates which you hold.

You also stated, I believe, that you acquired four of these vessels in reliance upon the terms of the certificates which your company held and that this action would not have

76 been taken if your certificates had then been limited like the so-called corrected certificate. Will you clarify that for the Court?

A. That is correct. We reacquired title to our five vessels, four of which were the vessels operated on the routes covered by our certificates, and we would not have reacquired those four vessels or we did reacquire those four vessels in reliance upon the terms of the certificates which we held and which were unrestricted.

Biggs, J. Let me interrupt at this pont, because it is not clear to me. These seatrain vessels were requisitioned by the Government, I suppose, in the usual fashion. They then came out of service, and I don't understand what the witness means by reacquiring them.

Mr. LaRoe. From the Government.

Biggs, J. They would have reverted to him.

Mr. LaRoe. No; the Government took the title.

Biggs, J. But under the Act isn't there a provision whereby the vessel is returned to the owner, or is it an outright purchase by the Government?

Mr. McCollester. If I may explain, your Honor, under the

Act permitting requisition the Government may either requisition title or it may requisition use.

77 Biggs, J. That is correct.

Mr. McCollester. If it requisitions use, then on the termination of use the vessel reverts to the owner.

Biggs, J. Here they requisitioned title?

Mr. McCollester. Here they requisitioned title. There is a provision in the statute for operating ships for a just compensation to be determined. Then there was a provision in the statute also that if the Government had requisitioned title it might as a result of negotiation with the former owner and solely on agreement with the former owner, with his agreement, change the requisition from a requisition of title to a requisition of use only, but that required the consent of the former owner and involved waiving the former owner's right to just compensation for the full value of the vessel.

Biggs, J. What happened here?

Mr. McCollester. That was what happened here. The Government requisitioned title of these ships, which gave Seatrain a claim for just compensation for the full value of the ships.

Mr. LaRoe. I think that needs a little clarification.

Biggs, J. Suppose we get it this way first, Mr. LaRoe.

78 You say the Government requisitioned title?

Mr. McCollester. That is right.

Biggs, J. Did Mr. Brush then agree that the vessels be received back?

Mr. McCollester. There were then certain negotiations which I did not participate in. I therefore hesitate to talk about them. I can tell you what the law is. There were negotiations as a result of which Seatrain agreed to take back title to the vessels and waive its claim for just compensation for the full value of the vessels and convert the requisition of title to a requisition of use.

Biggs, J. All right.

By Mr. LaRoe:

Q. What was the value of these vessels; the cost of them?

By Judge Biggs:

Q. Just a moment. You heard what Mr. McCollester said. Is that substantially correct, the way he put it?

A. No, your Honor. I think Mr. McCollester has left out two very important time elements.

Q. You put them in.

A. The cost of the vessels to my company, those four vessels, was approximately $7,700,000.

79 Q. You mean now?

A. When purchased. Mr. McCollester did not state that

the vessels when originally requisitioned were requisitioned for use.

Subsequently two of the vessels were very materially altered by the Government, and the point of my testimony is that those alterations took approximately six months to carry out, so that the vessels after being altered were nothing like what they were before.

Being under charter, the Government was obligated to return the vessels eventually to us in the same order and condition. Therefore, they would have had to undo all that work and pay charter hire to us while they were doing it, and it would have cost the Government just to make the structural changes over a million dollars, because that is what it cost them to make them to begin with, plus the charter hire while the structure was being realtered; and the amount of money that the Government would have to spend in reconversion was so great the Government decided to requisition title to the vessels approximately fourteen months after use had been requisitioned, and on October 1942 title to all our vessels was requisitioned, alterations having been made to a much lesser extent on two other vessels.

80 Second, Mr. McCollester said there was a law. There was not a law at that time which permitted the return to owners of vessels whose titles were requisitioned, but we wanted our vessels back and we started negotiations with the War Shipping Administration and found that they had no power whatsoever at any time to sell back our vessels. We went to Congress and got a special Act authorizing the return of the vessels, with the consent of the owner whose title had been requisitioned.

Q. Can you give the citation?

Mr. LaRoe. We will be glad to supply that.

Q. When was that?

A. That was in December 1942.

Mr. LaRoe. We have it in the petition.

Q. Come back to the fifth vessel.

A. The fifth vessel was built abroad and was not eligible for the coastwise trade and has never been used in the trade, and hence there was no question here about buying that vessel in reliance upon the certificates, and hence it could not be used.

Q. That is out of the picture?

A. That is out of the picture. So my testimony relates to four vessels, two that were very extensively altered and two that were altered to a much lesser degree.

81 In negotiating with the Government for the reacquisition of title to these vessels the Government said no, it would not return them in the same order and condition because it was going to cost them all this money.

I said, "That is perfectly all right. If you will make us an allowance of two hundred thousand dollars each we will take the vessels back as is when you return them without structural alterations."

Q. An allowance in what way?

A. That was two hundred thousand dollars and we could reconvert any way that we wanted to.

Q. In other words, the Government was to give you two hundred thousand dollars for each vessel and then you were to reconvert them yourself?

A. That is right.

By Judge LEAHY:

Q. Was that in addition to the use compensation?

A. That is correct. In other words, the Government limited its liability to the extent of two hundred thousand dollars.

Q. But above the use compensation?

A. That stood on its own feet, because that was just for the use alone and did not include any compensation for this
82 reconversion.

So in making that agreement with the War Shipping Administration we did so believing that we could use our vessels for any purposes whatsoever; and, incidentally, the Government finally accepted the agreement and the title was returned to us in April 1943; all of the five vessels.

Now, if we are required to carry freight only in railroad cars, and on top of that interchange it only with railroads at both ends, and on top of that without transfer, why, just the first condition alone for those first two ships would cost my company, according to my estimates, approximately a million dollars each, less the two hundred thousand dollars allowance, or one million, six hundred thousand dollars.

By Judge BIGGS:

Q. I am getting over my head here. Take vessel No. 1, in the first instance. Your construction of this certificate, I take it, is substantially that of Mr. LaRoe's. How will that operate in respect to that first vessel? Let us put it that way.

A. Well, that first vessel might be able to carry say a half dozen cars in its hold at the present time, but that is the extent, instead of having a capacity for a hundred cars.

Q. As it used to?

83 A. As it used to, plus its capacity to do all the other things that it was designed to do in addition to carrying freight in cars. If we must now realter that vessel so as to carry freight only in cars, my company on that one vessel is going to have to spend eight hundred thousand dollars at least for the

structural alterations, and it is going to take us, I presume, at least six months, and there is another quarter of a million dollars in value of use which the Government is paying us; so that for that first vessel it would cost my company over a million dollars in order to use it under this proposed corrected certificate.

Q. You embarked on this course because you had the original certificate?

A. That is right, sir; and we never conceived that the Commission had the power or would tell anybody how to conduct its operations.

By Mr. LaRoe:

Q. May I ask you if it has been made clear to the Court that this vessel of which you speak without substantial reconversion could be used for handling general cargo?

Biggs, J. It is perfectly clear.

By Judge Biggs:

Q. Now come to the second vessel.

A. It is the same thing. They were two sister ships and they were altered identically. The other two ships were not altered.

Q. This is three and four?

A. Three and four were not altered so extensively. The only alterations there were the installation of additional quarters and the putting aboard of the cargo-handling gear, a heavy lift gear for which the vessels were originally designed and constructed when they were to operate at a port without shore facilities for handling any or all commodities. Those were the only changes made in the second of the two ships, but we would not have acquired those two ships in spite of the fact that we do not anticipate any substantial loss in the reconversion if those two ships were to be confined to carrying freight only in railroad cars interchanged with railroads at both ends of our line without transfer. Those ships we just would not have bought, that is all, because we just don't believe that we or anybody else could succeed in running a business so extremely limited as that would be under this corrected certificate.

Q. This may not be a pertinent question: Is the stock in Seatrain Lines, Inc. publicly owned?

A. Yes, sir; we have about 140 stockholders. It so
85 happens, as a practical matter, the Management actively controls Seatrain Lines and has always controlled it.

Q. Are you the inventor of the seatrain device?

A. Yes, sir; and the designer.

Mr. LaRoe. I have only one more point to bring out through this witness.

By Mr. LaRoe:

Q. I did want to ask you if you can give an over-all figure as to what the total loss would be if you include the cost of conversion?

A. A little over one million dollars each, two million, one hundred thousand dollars for the two, which, incidentally, is two-thirds the entire capital which I have raised to put in this company. Now, we can't stand that loss, and as a result, I am sorry to say, those two ships have been offered for sale while there is a market. We can't wait, and our marine superintendent for the past week has been engaged in inspecting the ships for the prospective buyer. We cannot stand that loss, so it is an extremely serious thing to us if we have made a mistake or misunderstood what we have. There is only one way to save my company, and that is to liquidate in part. So I think certainly to us it is apparent that no prudent businessman could have done
86 anything but what we did in taking the original action in reliance upon the certificate which we held, which did not specify how we should use our vessels, and no other certificate ever had been issued at that time specifying how people should use their vessels.

Q. Mr. Brush, in the affidavit you stated that in reliance on the original certificate you had continued to maintain your organization and carried on litigation regarding through routes and joint rates and car service, and so forth, and that you would not have done this except in reliance upon the certificates. Will you please state more specifically what you did?

A. During the war a large part of our organization has been used to operate ships for the Government, as all other steamship lines, and we have handled the Cuban business for the War Shipping Administration and have been paid a fee, an agency fee for conducting operations for the Government to and from Cuba; but in addition a part of our organization which was not used in the Cuban business has been held open, so that we have maintained that portion without any compensation. We have had two idle terminals, one of which, the Texas City Terminal, could not possibly be used, as a practical matter, for any other service but the coastwise service. That terminal to maintain, insure, pay taxes on, and pay rent has cost us a little over thirty thousand dollars a year.

87 We have maintained our cases before the Commission in connection with our tariffs and other matters, intending to go back into our trade routes after the war, and I have reviewed our figures and find that we have been spending to maintain our coastwise organization and facilities a little over $140,000 a year,

which we would not have done if we had held certificates that we did not believe we could operate on.

So we would not have done all those things except in reliance on certificates which we believed we could operate under and which we applied for and received.

Q. You state in your affidavit that your company had made expenditures for a new and larger terminal at New York, which expenditures would not have been made except in reliance upon the terms of the original certificates. Will you please state what those expenditures were and relate to the Court what that situation is?

A. Before we started our Texas City service between Hoboken and Texas City we looked at Hoboken and many of the essential facilities for the added traffic which we hoped to handle, and we entered into negotiations with various property owners, including the landlord of the railroad for the additional area and facilities to handle the traffic which we contemplated handling in the
88 Texas City service, and we were only successful to a very minor degree in getting on a temporary basis two pieces of property from the Erie Railroad. That property, incidentally, was subsequently condemned and turned over for war uses and is completely gone. Buildings have been erected on it.

So for some time we have been seeking to expand our terminal facilities at New York, not being able to handle with the facilities which we had under our control all that traffic. So several years ago we undertook a complete survey of the future situation which we felt would confront our company, and finally located a piece of property at Edgewater, New Jersey, which was owned by the Colgate, Palmolive Peet Company, which seemed ideally suited for our purposes. It was located between the George Washington Bridge and the Lincoln Tunnel opposite the 125th Street Ferry and was right adjacent to the main arteries leading out through New Jersey and the rest of the country. The property was adjacent to the main yards of the New York, Susquehanna, and Western Railroad.

I went to the New York, Susquehanna and Western and asked them if they would be interested in handling our through business, and by "through business" I mean that business which is described in our corrected certificate, namely, the traffic which is
89 handled in cars interchanged with railroads at both ends of the line and without transfer. In other words, interior to interior business. The Susquehanna was interested, but the piece of property which we had in mind was not big enough to do that type of operation plus serving as our New York Terminal facility, so we arranged and got an option from the Susquehanna for the land to the south and directly adjacent to the piece of property of

the Colgate with the idea of handling on the Susquehanna property to be purchased the through vessels and handling on the other piece of property the other portion of our business which we handled locally at New York.

Now, New York City, as you know, or New York Harbor, as you know, is composed of Staten Island, Long Island, Brooklyn, Long Island City, the Bronx, Manhattan Island, and the Jersey waterfront, so that any steamship line operating in and out of New York Harbor must serve that whole community, and there is no belt line running around all those islands. The transfer of all traffic is by truck or by lighter.

At Hoboken we did not have sufficient facilities to handle that type of traffic. We wanted more lighterage berths. We did not want to have to depend on being able to pick up a berth overnight when somebody delivered freight in a lighter without any booking. We wanted sufficient lighterage berths to handle
90 freight to and from the lighter. Our Hoboken pier only had two berths and they were very congested berths on a very narrow pier.

Q. You mean lighterage berths?

A. Lighterage berths, and the lighterage traffic had to be handled with all the other traffic. We wanted sufficient space, warehouse space, to receive traffic, to hold traffic, as steamship lines must hold traffic to inspect it, to weigh it, to count it, to cooper it, to warehouse it when storage is required, and all the other things that are done in the ordinary steamship terminal.

We needed a far larger warehouse, and on the Colgate property was a modern building which cost over three hundred thousand dollars, three stories, which was ideally suited for the handling of all traffic that required handling at our terminal or transferring, incidentally, from one car to another—particularly perishables which need protection in the winter where you can't do it in zero weather and they must be taken inside.

So that we had an ideal warehouse and the space around the warehouse was ideal for the receipt and delivery from the trucks so that we could have a far more efficient operation in the future than we could have possibly had back at Hoboken; and we
91 therefore decided to abandon Hoboken as our future terminal because we hoped to grow and we hoped to expand.

On December 31, 1943, we purchased from the Colgate, Palmolive Peet Company that property, accepted the option from the—at least told the Susquehanna we had purchased the property and would expect them to hold their adjacent property available for us when we could proceed to go ahead with our business.

Well, now, the entire Colgate property is quite useless to us

under this corrected certificate and I can't see how it is possible for us to use it.

By Judge BIGGS:

Q. In round figures how much has been expended in that direction?

A. A little over two hundred thousand dollars, and that property was sold to us on the most favorable terms because of very peculiar circumstances, but actually it cost us a little over two hundred thousand dollars.

In connection with the New York terminal we are going to have to spend about three-quarters of a million dollars to put up the kind of a pier that we have designed, which, incidentally, is not the kind of pier that we had at Hoboken. It is a ninty-foot pier where we can handle all of our lighterage traffic and
92 all of our truck traffic and where we could do things efficiently which we could not do at Hoboken; so that the damage really is in blocking us and I don't know what to do now. I don't know whether to sell the property or what to do. It is like the ships. We are just caught. If the Government returns our ships what do I do? They are worth two and a half million dollars a year. It is going to take nine months to build a terminal. I don't dare proceed with building a terminal. So that we did our best to persuade the Commission to handle this thing on the basis of quick decision and determine it on whether they had the right to do these things.

By Mr. LAROE:

Q. Let us not get into the law part. I would like to ask you this question: You mentioned the George Washington Bridge and the Lincoln Tunnel, two strategic locations of your new terminal. With respect to those highways, as you interpret this certificate, can you handle any such traffic under this certificate?

A. No; not even from our own freight stations in New York City; and, incidentally, there is one other, too. We have one in Brooklyn.

Q. Are they reached by rail?

A. No; they are not reached by rail, and even if they were I don't see how you can interchange with a railroad at a
93 freight station without transfer. I don't see how it is possible to be anything but a car ferry under this corrected certificate, and it is our business judgment that we could not succeed in operating our ships which were not designed as car ferries, but to merely do some of the things which the car ferries could do, plus all the things that the other ships could do. The

very purpose of Seatrain Lines was not to be a car ferry and we don't think we can run them as car ferries.

Mr. LaRoe. That is all.

Biggs, J. Is there any cross-examination?

Mr. Dumbauld. Yes, your Honor.

Biggs, J. We will recess until 2:15.

(At this point a recess was taken until 2:15 o'clock P. M., the same day.)

2:15 O'CLOCK, P. M., THE SAME DAY

Present: As before.

Biggs, J. Will your witness resume the stand, please, Mr. LaRoe.

94 Cross-examination by Mr. Dumbauld:

Q. Mr. Brush, as I recollect your testimony Seatrain never had at any time more than five vessels; is that correct?

A. That is correct; owned more than five.

Q. And only four of those were in actual operation in this trade?

A. That is correct.

Q. And of those four the ones that you described as numbers three and four were not altered in such a way that they could no longer be used in the trade?

A. Only to a small extent, as I stated. They put additional quarters on and that would have to be altered back, but our allowance of two hundred thousand dollars each should about cover the cost of realtering.

Q. That is, that allowance was for each of the four and not for just the ones that you called numbers one and two?

A. That is right; two hundred thousand dollars each, or eight hundred thousand dollars allowance maximum. Mind you, if we did not spend two hundred thousand dollars the Government would not have to reimburse us any more than our expenditure.

Q. That is as you understood it, you would get two
95 hundred thousand dollars in any event?

A. No.

Q. Regardless of what——

A. No; I am sorry if I gave that impression. It was a maximum allowance for making any structural alterations that we wanted to make or were required to make.

Q. But I thought with respect to numbers one and two if you were able to use general commodities without your special seatrain equipment you would not need to make any alterations on one and two?

A. Oh, yes; there are thirteen gun stations on them and all sorts of things that are attached to each ship beyond the basic changes in the structure that I was speaking of.

Q. But your testimony now is that you were not to get two hundred thousand dollars absolutely for each ship, but only such part of that as you should actually spend in making alterations?

A. That is correct.

Q. But you did not expect to spend much on the ones numbered three and four?

A. Yes; there is a question whether we can take out the quarters and make the necessary changes that we wanted to make for two hundred thousand dollars, but there won't be much difference. We don't expect to lose any money on those ships.

96

Q. But as to one and two the alterations would be more extensive; is that correct?

A. That is correct.

Q. And on those you would be sure to use your two hundred thousand dollars?

A. We will use it on all four of them. We will spend two hundred thousand dollars on each of those four ships.

Q. If you were to sell these ships you say that you would not lose any money on the transaction, or would you?

A. Why, no; I did not say that. I said that we were placed in this position that at the present time there is a market for those ships.

Q. Yes; and if you sell them now you would not be out of pocket any money?

A. We can sell them to our competitors and they can use them as is, or sell them to Uncle Sam or to some foreigner or anybody, and we can get paid for those ships.

Q. But if you sell them you would not get the two hundred thousand dollars?

A. Quite right.

Q. But you would recover a profit on your original——

A. We would receive the full value of the ships as they are now, and they are very suitable for all sorts of purposes right now.

97

Q. Would you recover as much as you paid for them originally? Is the market that high that you could make a profit on them now?

A. I think there is a chance to get as much as we paid originally. That fluctuates from day to day. That depends on a guess as to when the Japanese war is going to end. If you believe it is going to be over very shortly we won't get very much for those ships.

Q. I believe it was your testimony that you expanded your terminal facilities in New York. Was one of the reasons for that the

fact that the Government had condemned your approach to the piers at Hoboken?

A. No. As I testified, the expansion of the facilities that we tried to get at Hoboken started back in 1937 and 1938.

Q. You mean it was due to your volume of business?

A. That is right, and our prospective volume of business.

Q. But it is a fact, is it not, that you are no longer able to use Hoboken as your pier?

A. At the moment, yes; without permission of either the Government or of the old landlord. In other words, a part of the right of way was condemned so that we had only—our
98 rights were only over a fifty-foot strip of land and water, and our ships were sixty-foot beam, so we had to trespass.

Q. So that you would have had to move to some type of new quarters in any event, would you not?

A. No.

Q. Or go out of business?

A. No; because the landlord tomorrow can say, "Why, sure we will let you trespass on the property to the south," or the United States Government can say, "Here, we bought this for Terhune and Lang drydock. You can operate over it just the way you always operated over it." It is more congestion.

Q. But unless you made some other arrangement with some other party it depends on their voluntary agreement and not yourself, and you would have had to move, would you not?

A. We haven't up until within a matter of hours—we had not yet abandoned all idea of using Hoboken and still had the possibility of having two terminals. Now, that depends on where you get rates and where you get routes and a thousand and one other things, and we don't have any rates and routes to Edgewater.

Q. But unless some contingency took place that was not in your power solely to control, it is likely you would have had to abandon Hoboken and take a location somewhere else?

99 A. Well, maybe I might tell you how much money we spent on just the opposite theory. In other words, I can't agree with your conclusion. We realize there is a risk, but certainly I can't agree with that as a conclusion that we could not go back there. At this moment we could not go back there.

BIGGS, J. Isn't that a subject about which the Court can draw its own conclusion?

Mr. DUMBAULD. That is perhaps true, your Honor. I will proceed to another subject.

By Mr. DUMBAULD:

Q. Would it have been necessary for you and was it necessary for you to obtain additional facilities simply because of the natural and normal increase of your business?

A. Are you speaking at Hoboken? I want to make sure that I understand your question.

Q. Well, take it at Hoboken.

A. We tried to get additional facilities at Hoboken and were not successful except to a limited degree.

Q. So that your business was expanding and it required additional facilities?

A. No; our business after a few months of starting the Texas City service, it ran its peak and there it stayed, so you can't say it was expanding.

Q. Why did you try to get additional facilities at Hoboken, then?

A. I got them temporarily from the Erie Railroad.

BIGGS, J. I think probably the witness and you are talking a little bit at cross purposes.

By Judge BIGGS:

Q. I am not clear, Mr. Brush, whether or not you got the facilities which you have described in your direct testimony because of an actual increase in business or because of a prospective increase in business or both?

A. Both, your Honor. For example our freight station at Hoboken was not anything like big enough to handle the traffic which we wanted to handle at the freight station, which forced us to use all sorts of ways and means of getting around that inefficient means. We did not have the facilities. I can give you illustrations, if you want.

Q. I don't think it is necessary.

A. The freight station was not big enough. Our pier was not big enough and our lighterage berths were not enough, and it was to increase those facilities for handling the traffic which comes to us at New York and which we deliver at New York, which has got nothing to do with interior rail movements, handling railroad cars interchanged with railroads at both ends and without transfer. It was in connection with all the other business that we needed the facilities.

By Mr. DUMBAULD:

Q. Do I understand you to say that if you limited your business purely to the typical Seatrain movement of loaded or empty freight cars that you would not have sought to expand your facilities at Hoboken or elsewhere?

A. Would you mind stating that question again? Because we never did limit ourselves to handling freight cars.

BIGGS, J. I think the trouble was in the word "typical."

Mr. DUMBAULD. Yes.

By Judge Biggs:

Q. Suppose we strike out the word "typical" and put it this way: First of all, are you presently engaged in any operations?

A. No, sir.

Q. If you were to restrict your future operations to the moving of cars and the shipping of cars from rail to seatrain boats and back again to rail would you need the additional facilities?

A. No; we would not need the facilities we formerly had.

102 Q. Why not?

A. Because there is not enough of that traffic.

Q. I see.

A. All the other facilities like your freight house, lighterage berths, and pier where we receive and deliver goods and interchange with trucks, you would not need any of those.

Q. You would have in the future, as soon as operations came back to normal, need for those facilities?

A. Not if we are restricted in handling business between two interior points by rail without transfer. We don't need any facilities whatsoever at the port except a connecting line down to a trestle to one of our ships. None whatsoever.

By Mr. Dumbauld:

Q. Isn't it true that ninety per cent of your business, approximately, was this type of business that I call——

A. No, sir; not twenty-five percent was such business; not twenty-five percent.

By Judge Biggs:

Q. Well, there seems to be a discrepancy there between what Mr. LaRoe stated in his opening to us and what you state. He indicated ten percent.

A. Your Honor, let me say this: This new certificate has three conditions, one piled on top of another. All freight

103 must be transported in railroad cars. That is condition number one. But we can't transport freight just in railroad cars and receive it from shippers and receive it from consignees or receive it from trucks or receive it from other steamship lines. We must receive it from a railroad in a car and without transfer. When you consider the volume of traffic which would be so handled, my statement is correct; and I can show it right in your own reports that the volume of traffic which Seatrain Lines handled from an interior point through the port without transfer to the port of destination delivered to a railroad and handled again without transfer in a railroad car was not twenty-five percent of our business.

By Judge LEAHY:

Q. I am confused at that point, because in Commissioner Porter's opinion he writes as follows:

"Applicant lays stress on our prior reports relating to Seatrain Lines, Inc. They," which I interpret to mean the prior reports, "do not show that applicant at any time handled freight in any manner other than in railroad cars loaded on vessels with the exception of a small amount of liquid cargo handled in the tanks of the vessels with which they are especially equipped."

104 Is that an erroneous statement according to your view?

A. It is erroneous in two respects: In the first place, the reports do not show it; in the second place, he has left out two other conditions they put in.

By Judge BIGGS:

Q. Leave the conditions out for the time being. We understand about the conditions. They present questions of law, as well as questions of fact. I think I speak for all of us when I say we are clear about the conditions—not about the legal effect, but what they are.

Now, referring to Commissioner Porter's statement, without regard for conditions, and just assume that no conditions were imposed on you and that you had your original license and therefore you could handle anything you wanted in any way that you wanted between these ports or such ports as you choose, as a matter of fact, how much of that would be not in cars? That is the point.

A. In the future or in the past, sir?

Q. In the past.

A. We will have to divide now, because we will have to divide between our New York-Texas City service where we are beginning to handle quite a volume of traffic not in cars.

Q. First of all let us restrict ourselves to the Hoboken-

105 New Orleans in the past. How much of that traffic was not in cars?

A. Practically none.

Q. It was practically all in cars?

A. That is correct.

Q. You had just started your Texas service?

A. Yes.

Q. How much of that was not in cars?

A. I would hesitate to say. The volume was growing.

Q. Can you give us an approximation? We will understand that it is an approximation.

A. We operated our Texas City service, I think, for about ten

months, and I very frankly—I would not dare say in percentage or in tons how much was handled not in cars. I will say this, that it was not substantial for the ten-month period.

Q. Then what is the twenty-five percent business that Commissioner Porter speaks about?

A. Because in both our New Orleans and our Texas City service the traffic which we handled was not interchanged with railroads at both ends and handled without transfer, as the Commissioner's own reports and Hoboken Division's case show. They say in the Hoboken Division's case that five to ten
106 percent was transferred even when handled by railroad; they say that ten percent was lighterage, which of course was not handled in interchange of cars with a railroad. The balance of the traffic was traffic which originates at the port and is destined for a port.

Let us take, as a practical matter, under this certificate I have a problem of operating under the corrected certificate, and I have all of our freight station traffic to handle. I don't see how I can handle it. Therefore you add the freight station traffic. In addition to that you add all the traffic which was delivered by truck to Hoboken, and on account of congested facilities——

Q. Yes, Mr. Brush; we understand that. What we are doing now, if you will pardon my saying so, is simply repeating something we had before. Let us get back to this question.

Biggs, J. What further questions do you have, Mr. Dumbauld?

By Mr. Dumbauld:

Q. Isn't it true that in all the proceedings before the Commission Seatrain Lines emphasized and stressed as a selling point, if I might call it that, the superior service which Seatrain Lines is able to render as compared with break-bulk carriers by the
107 fact that you can transport freight in railroad cars?

A. That is only partially correct. Of course, that was the whole idea of Seatrain, to be able to handle this through traffic in cars without transfer; but all of our traffic did not consist of that kind of traffic and you don't save in handling, as the Commission says you do, the business which is port-to-port business. How do you save in handling whether you handle it in a car or any other way? There is no saving. The Commission is fully aware of that, because we had several cases involving our port-to-port rates as compared with the other—with our competitors' rates on port-to-port traffic where there was no saving in handling.

Biggs, J. I think all we are doing at this point is arguing the question of whether the Commission was right or wrong. We want the facts.

(The last question was read by the Reporter as follows:)

"Question: Isn't it true that in all the proceedings before the Commission Seatrain Lines emphasized and stressed as a selling point, if I might call it that, the superior service which Seatrain Lines is able to render as compared with break-bulk carriers by the fact that you can transport freight in railroad cars?

108 By Judge BIGGS:

Q. The answer is yes or no.

A. Yes; to the extent of the traffic which is actually described in the corrected certificate, but no as to the rest of the traffic which we handle and which is all shown in our tariffs.

By Mr. DUMBAULD:

Q. There is one further point here now. You say that you stressed the fact that in the corrected certificate you have to interchange cars with a rail carrier at both ends of the line. Now, would it change your answer as to the proportions if you took it where you just changed or interchanged with a rail carrier at one end of the line and made delivery directly to your consignee?

A. Very definitely; oh, very definitely, because then we would be permitted to handle port-to-interior traffic or interior-to-port traffic. Now, assuming that we still were permitted, excluding the percentage that is to be transferred even when handled through a railroad car, which is five to ten per cent——

Q. Let me put it this way: What percentage of the traffic would there be which is handled in cars on your ships? In other
109 words, regardless of whether you get it from a railroad or whether you give it to a railroad, but just taking that portion of the voyage which is on your ship, what percentage of the traffic that is moved by your ships is in railroad cars at the time it moves on the ship?

A. Well, I think I have answered that before. Substantially all of the traffic in the past has been handled in that way, and the reason being several reasons: One was lack of facilities, particularly at New York.

Q. That is all right. Now, with regard to this Colgate property, I believe you had two properties that you purchased. One was for your through traffic and one was for local traffic?

A. That is right.

Q. Would it be possible for you to sell one of those tracts that you acquired separately from the other and come out whole?

A. Well, I don't know what the market for real estate for the Colgate property would be at the moment.

Q. Which was to be for your through traffic?

A. The Susquehanna. That has not been purchased. We merely have an option on it if we locate there.

Q. That has not been purchased yet?

A. No.

Q. But the Colgate property is all that you have pur-
110 chased?

A. That is correct.

Q. And it was intended for which type of traffic?

A. Having a warehouse on it, it would do all the operations that are required in connection with terminal service, including storage; and the land adjacent to the new pier that we were to build, where we could receive and deliver to and from both trucks and lighters, that property was ideally suited for traffic which originated in the New York district area that was not to be moved by rail or which was destined to the New York district area which was not to be moved by rail.

Q. But you don't know whether you could sell that at a profit, do you?

A. No, I don't.

Q. Actually, if you were just acquiring facilities for use of the through traffic you would probably have spent or would spend less money than you would for the handling of both types?

A. We would not do such a thing; we could not exist under that arrangement. That is what I am trying to tell you gentlemen, that there is not enough of that type of traffic for us to exist upon and therefore we would not make any expenditure.

111 Q. Let me ask you one further question: Is it your intention to abandon the type of service which I call typical Seatrain service and by which I mean the transportation of freight in railroad cars on your ships?

A. We are going to abandon half of it if we possibly can by selling the two ships and put our company in liquid position to find out where we are, because there must be something wrong if this is in the public interest.

Q. That is, it is your purpose to change the type of business that you will do in the future from what it was in the past?

A. No; not at all. We don't expect to change our type of business at all. We expect in the future to handle traffic to and from our freight stations by truck, by lighter, by any other method, including railroads, whatever is best at the moment. We expect in the future to handle port-to-port business; we expect in the future to handle port-to-interior business; we expect in the future to handle interior-to-port business and not confine ourselves just on interior business and even that without transfer, because a lot of that can't be handled without transfer.

Q. But in answer to a question by Judge Biggs you did say in the past it was practically all transported by railroad
112 cars?

A. Well, you immediately leave out two additional conditions. If you take out those, then we can get back to the percentage on that type of traffic, but that is not what the Commission has done.

By Judge Biggs:

Q. Let me put in this way: Suppose, Mr. Brush, the amended certificate, the second certificate, had not been issued? We are getting very far afield, but I think this may clear up the matter and perhaps bring it to a conclusion. Suppose it had not been issued and you had just your original certificate. Did you plan to decrease your handling of freight by freight cars?

A. Yes, sir; for this reason: It is not economic to handle certain port-to-port business or certain port-to-interior business in railroad cars. It is an extra operation and an extra expense, and the reason we had to do it is because our pier and our facilities for the receipt and delivery of that traffic was so limited at Hoboken the only way we could handle it was to get some railroad facilities, get it into a car, and handle it, load it into a car, switch the car around to our ship, which was not the economic way of handling it.

Q. One other question and then I think I am through,
113 speaking for myself:

How much of that decrease, in percentage, amounted to your desire for prospective decrease in handling?

A. I would say that my conception of our future service after the war is that we would have handled something like sixty per cent in cars and forty per cent not in cars.

Mr. Dumbauld. That is all.

Biggs, J. There is one question which has been rather disturbing us here, and I take it that everyone at this table is with Seatrain and that there are no strangers present, so to speak. Am I correct in that?

Mr. LaRoe. There is nobody in the case, if your Honor please, except ourselves for Seatrain and the two counsel for the Government.

Biggs, J. All of the gentlemen sitting back of Mr. McCollester are employees of Seatrain?

Mr. LaRoe. Mr. Winn here is my associate, who is just helping me; Mr. Mathey is Mr. Brush's assistant, and Mr. Bishop is my assistant.

Biggs, J. As you know, there is a Supreme Court ruling that certain admiralty cases have to be heard in camera. This is not an admiralty case and there has been no one present

114 throughout, but nonetheless certain information does appear in the record and I am not at all sure that we should not impound the record. I take it there would be no objection to that if the Court should so decide?

Mr. LaRoe. None whatever.

Biggs, J. Have you any objection, Mr. Dumbauld?

Mr. Dumbauld. We have no objection.

Cross-examination (cont.) by Mr. Reidy:

Q. You did not present the testimony that you have given today at the Interstate Commerce Commission at all, did you, Mr. Brush?

A. No; we were never asked up to this moment as to how we proposed to conduct the operations in connection with the various types of businesses that we were engaged in; namely, port-to-port business, rail-water business, water-rail business, or through rail-water-rail business.

Q. The Commission reopened the case and specifically on two occasions set it down for hearing and your company did not put in any evidence, did it?

A. No.

Mr. Reidy. That is all.

Leahy, J. Were they invited to?

115 Mr. LaRoe. No.

Mr. Reidy. Oh, yes; they were invited to.

Biggs, J. There is no use having an issue of fact on that. I suppose the record shows.

Mr. Reidy. Certainly.

Mr. LaRoe. I am willing to stand on the record on that.

Biggs, J. Well, we will stand on the record on that.

Mr. LaRoe. Jut one or two questions I think the Court may not clearly understand about this lighterage business.

Redirect examination by Mr. LaRoe:

Q. Is it or is it not true that most, if not all, of your lighterage business in the past, including your Manhattan business, for reasons of convenience and possibly because of the limited facilities at Hoboken has in fact by you been taken out of a lighter and put in a car?

A. That is correct; when we could get the cars.

Q. That is not railroad interchange business; that is your own business, isn't it?

A. Yes; and, of course, it was not received or delivered

116 in a car; it was obviously received loose.

Q. Under this corrected order could you handle that business?

Biggs, J. I think we have gone all through that. The Court will have to draw its own conclusions in that respect.

Q. Will you illustrate why even the through business covered by the corrected certificate must sometimes be transferred from a car?

A. Well, the Hoboken Divisions case went into that quite extensively and gave five reasons why.

Q. You tell the Court.

A. Well, take the case of a bad-order car, or a car which has been loaded improperly by a shipper or an improper car which has been used by a shipper.

Q. How about cooperage? Do you ever have to unload for cooperage?

A. Yes. For example, certain commodities shippers require inspections on from time to time, particularly when it is going on a sea voyage.

Q. Well, then, even your through business rail-ship-rail, some of that you could not handle under this corrected certificate?

117 A. Well, the Commission's own decision in the Hoboken Divisions case says five to ten per cent.

By Judge Biggs:

Q. Leaving the Commission's decision out of it, what do you say?

A. Yes, sir; a very sizable percentage must be transferred if it is to be handled.

Mr. LaRoe. That is all.

Biggs, J. Now, gentlemen, let us get back to the law. Who will open for the United States and the Commission? Mr. Dumbauld? Very well.

Argument of Mr. Dumbauld

Mr. Dumbauld. May it please the Court, as has been stated by my learned friend, Mr. LaRoe, this is a case of first impression with regard to the power of the Commission to correct a certificate improvidently or inadvertently issued.

Biggs, J. Let us assume, first, improvidently. Is there any distinction which you make between "improvidently" and "inadvertently"?

Mr. Dumbauld. No. I think those are just practically synonyms, as far as I am concerned. It may be a more refined

118 analysis might discover some distinction, but I take it to mean a simple mistake, just as, for example, here today it was more or less of an inadvertence on my part in failing to object to the introduction of those papers that were from some other record than from W-543 or whatever the number is of the present

case. I thought I saw that everything in there was the record of this case, but there happened to be some other papers there which I did not notice at the time, but when it came to my attention I, of course, then noticed that that was not what I had thought was there.

BIGGS, J. Without reference to Webster's International Dictionary, I always thought that the word "inadvertent" meant something done without one's mind adverting to the result.

Mr. DUMBAULD. That is right.

BIGGS, J. I am not at all sure that "improvidently" is the equivalent; but for the purposes of your argument let us assume that they are, and you may proceed with it.

Mr. DUMBAULD. I suppose "improvident" might mean that having adverted to the question they had made a wrong or unwise decision. I see that that distinction could be made; but when I used the word I meant the same, as just based upon a mistake or error.

While with respect to this issue, which we say is the only
119 issue in the case, this is a new question first presented to this Court so far as I have been able to ascertain, I do think it proper to dismiss from our consideration at the outset a great many of the calamitous consequences of which Mr. LaRoe has spoken. In other words, I say that the way this case arose before the Commission, all that is presented to the Court in this proceeding is the question of law as to the Commission's power to correct the certificate, and I don't propose to argue any of the merits of the Commission's decision as to the certificate.

It is true, and I think it could be sustained, because any failure to introduce evidence when Commissioner Porter expressly, twice right in that same hearing, asked if there was any evidence to be introduced, and Seatrain deliberately refrained from introducing any evidence, it seems to me that very possibly on a strict view of things it is Seatrain's own fault that the certificate as corrected does not correctly reflect what the facts would be if evidence had been taken in detail and if Mr. Brush had testified before the Commission what he has testified here and other appropriate testimony had been taken.

But I have sufficient confidence in the fairness and magnanimity
120 of the Commission, to which the courts have often referred as one of our oldest and most respectable tribunals whose proceedings are modeled after those of the courts, and Judge Cooley was the first counsel or the genius under whom the Commission's rules grew up, and many people today say that they are too much of a judicial temper and it leads to unnecessary delay and hearings, and so on, and fullness to which they do go in their practice; and so I feel very confident that if this Court

decides the question of law which is involved in this case that the Commission will undoubtedly take such steps as are proper and fair in order to see that a hearing is given on the evidence so as to get the real facts of the factual situation before the Commission.

But I do say that that is not necessary in order simply to sustain the Commission's order as a legal proposition, because I say that Seatrain had a full and fair hearing and an opportunity to offer the evidence, and if they chose not to offer it that is a matter for which they must assume the consequences, viewing it strictly, just as in common law I believe if you filed a demurrer to a declaration you had no opportunity to plead over, but later that was liberalized. So here I feel after this naked question of law is disposed of the Commission will give proper consideration to the actual merits of the case.

LEAHY, J. Would they do that on their own motion
121 or are you suggesting that the Court make that suggestion in any order it might make?

Mr. DUMBAULD. I presume the Commission would do that of its own motion. Of course, I can't speak for them and have no idea what they would do, but I am just judging from past experience and the willingness which they do have to give everybody exceedingly fair and full hearings on everything. By that I mean I don't propose to discuss the evidence supporting the findings as to what percent of the traffic was carried in cars and what percent was not. The Commission did make express findings to which the Court has referred in quoting from the report that practically all the traffic they did carry was this traffic in cars, and I think it will appear that Seatrain did as a strong selling point in support of their application point out the superior service which they rendered by reason of their ability to take loaded cars on board and discharge them without transfer of lading.

BIGGS, J. Let us come right to the point. There is one further thing I want to go into before you sit down. Let us come directly to the point. Here was an original certificate which according to the assertions made by Mr. LaRoe, which I don't doubt are made in
the best of faith, was given to Seatrain, the original certifi-
122 cate which is here before us, and which permitted them to engage in traffic without restriction, and it is precisely in terms the same certificate, for example, that was given to Newtex or any one of these other companies which are engaged in somewhat a similar line; that on the strength of that Mr. Brush acting for Seatrain went ahead and embarked on a course of conduct which, it seems to me, the record does demonstrate was an expensive one for his company. In other words, he committed his company to a course of conduct which is bound to cost it some expen-

ditures, substantial expenditures. Then about two years later the Commission seems to change its mind. Now, what have you to say as to that?

LEAHY, J. Keeping in mind, if I might add to the question, that at the time the certificates were issued under the grandfather clause apparently the same techniques were followed in issuing certificates to all other water carriers.

Mr. DUMBAULD. Yes. I think there is no doubt of that, that the certificate issued by Seatrain was in the same form that was issued to all other carriers; but now, as I view it, the Commission then later had occasion to advert to the rather doubtful question in my mind as to whether the expression "general commodities" does include loaded in empty freight cars. In other words, whether
123 a certificate authorizing transportation of general commodities does not merely mean the normal commodities that are carried in freight cars rather than to think of a freight car itself as a commodity.

BIGGS, J. Well, look at the certificate, Mr. Dumbauld. The certificate, however, is in the broadest terms.

Mr. DUMBAULD. Well, it says as a carrier of general commodities.

BIGGS, J. Yes.

Mr. DUMBAULD. Now, then, as I say, later in the Foss case the Commission held that "general commodities" was not broad enough to include "loaded in empty freight cars." In other words, the definition "general commodities" did not authorize Seatrain to carry loaded in empty frieght cars.

BIGGS, J. Quite true, but it did authorize them to carry general commodities.

Mr. DUMBAULD. That is correct. In other words, the doubtful question is simply whether loaded in an empty freight car is a commodity embraced within the term "general commodity."

BIGGS, J. I think you have the question reversed, haven't you? Here is a certificate which gives them a power to carry general commodities. That is the original certificate. Whether or not that included freight cars, it did include general commodities.

124 Mr. DUMBAULD. You mean other than freight; yes.

BIGGS, J. Let us assume it is not included. Let us assume "common carrier general commodities" did not include freight cars and let us say a freight car loaded or empty, with or without its wheels, is not a general commodity. Now, having embarked on a course of conduct in which the company was going to carry general commodities, two years later the Commission whisks that right to carry general commodities away from Seatrain and leaves it with this second certificate which is really only relating to freight cars.

Mr. DUMBAULD. Yes.

BIGGS, J. I think you have your proposition reversed. They had general commodities. It was taken away from them. How do you justify that?

Mr. DUMBAULD. As I view it, the purpose of the certificate proceeding under the grandfather clause is to bring about a certificate that represents substantial parity with what the carrier has been doing in the past at the grandfather date. Now, I think there is no doubt whatsoever that Seatrain was transporting loaded in empty freight cars during the grandfather period; in fact, that was their principal business; and, consequently, they are entitled to a certificate which does expressly authorize "loaded in empty freight cars."

125 BIGGS, J. Let us assume that, Mr. Dumbauld. Let us assume it for the sake of argument that they carried one hundred per cent traffic by way of freight cars, carrying loaded freight cars to a point and bringing back empty freight cars to another point. They then applied for a certificate both grandfatherwise, so to speak, and also public convenience and necessity for the Texas City operation, and lo and behold, let us say to their great surprise, the Commission gives them a general certificate to carry general commodities, and they say, "This is fine. We are glad to have it. We will immediately embark on this line of business that the Commission has been good enough to authorize us to engage in." They say, "True, it is far away from our grandfather right, but we have got it."

They go out, and we will say they spend a half million dollars in getting ready to engage in that business, and do engage in it, and then two years later the Commission comes along and says, "We are very sorry; we did that inadvertently; that is a mistake. Go back to your other business; go back to your old grandfather business." Can the Commission say that? That is the point here.

Mr. DUMBAULD. Yes; that is exactly the point here.

126 They argue that once they were granted the certificate, even though inadvertently and incorrectly representing their grandfather performance, "Hurrah! We have it; it can't be taken away from us——"

BIGGS, J. I don't say that is what they say. I am merely using that as an extreme illustration.

Mr. DUMBAULD. That, in fact, states the point at issue in the case very clearly. They say it cannot be taken away from them because it is a franchise or a contract.

BIGGS, J. And that they have acted on it and expended money.

Mr. DUMBAULD. Yes; and that is their second point, it seems to me, a sort of estoppel argument there. It seems to me the fact

that they find it necessary to admit that they must have acted on it and spent the money weakens the effect of their argument that it is a franchise or contract. That is, if there were any merit to the argument that it is an irrevocable franchise the minute it is granted, I say it does not matter then whether they have spent any money or not.

BIGGS, J. Let us reduce it even more narrowly. Let us assume, arguendo, that they had not acted on it, that they had merely received it. Treat it from your angle. Where does the Commission get the power to revoke it?

127 Mr. DUMBAULD. As I say, there are no decisions I know of on the point.

BIGGS, J. Well, is there any point in the law other than 315 (c)?

Mr. DUMBAULD. My argument is really simply one based upon public policy and the inherent power of any tribunal to correct errors and inadvertences. It seems to me, as the Commission has said, it would open the door to the assumption and exercise of powers which Congress has not granted if the Commission simply by making a mistake could validly do something in such a way that it could never be corrected or changed.

BIGGS, J. It keeps bothering me a good deal, and that brings me to this second point: You really rely on 315 (c), don't you? That is the only thing in the law?

Mr. DUMBAULD. The only thing in the law is that provision, that they may reconsider their orders.

BIGG, J. What about the statement of Commissioner Eastman to Congress, which is part of the legislative history, that it did not desire any right to abrogate franchises or certificates under the Act except under the motor vehicle carrier portion?

Mr. DUMBAULD. I don't think that is material to this case, because what he is speaking about, as I believe, appears from

128 the quoted passage. He says here in the passage quoted that revocation or suspension in the case of motor carriers is believed to be the most effective means of enforcement. In other words, he is speaking here of a revocation of a certificate as a means of coercion or as the club to force the carrier to obey other provisions of the law, to comply with the tariff and billing requirements or to comply with safety regulations. In other words, for any misconduct violating any provision of the Motor Carrier Act Commissioner Eastman wants to have the power to say, "If you don't obey these other provisions of the law we will revoke your certificate and put you out of business completely." In other words, he is using it as a coercive weapon in order to bring about compliance with the law.

BIGGS, J. The motor carrier section, Part II, gives the Commis-

sion the right to revoke whatever may be the reason, and he says he does not desire that in respect to water carriers.

Mr. DUMBAULD. That is right, because they don't need to have that coercive weapon in their arsenal.

BIGGS, J. At any rate, there is no provision in the Act for revocation of the certificate.

Mr. DUMBAULD. That is true. I don't consider this revo-
129 cation of the certificate, but rather a correction of it to express what it originally should have been if the Commission had been advertent to the facts as they existed at the time. In other words, that is just a correction to bring about what it should have originally been, but this in the motor carrier section is a provision dealing with a weapon of coercion to bring about enforcement of other provisions of the law.

Now, this also should be said: That the Commission has held in the Smith Brothers case that because the Motor Carrier Act has set forth this specific procedure regarding revocation that therefore they think that that is meant to be the exclusive method of dealing with that, and the Commission has held that in the motor carrier certificate once it is issued they consider it as inviolable except in accordance with the statutory procedure.

BIGGS, J. But why should the certificates issued under Parts I and III be under any different status?

Mr. DUMBAULD. Because in the case of Parts I and III there has been no specific exclusive statutory——

BIGGS, J. But the language is identical. The language with respect to the issuance of certificates of necessity or grandfather
130 certificates is in haec verba. Are we to construe Part I and Part III differently despite the fact they are in the same words? How could we do that?

Mr. DUMBAULD. That is, Part II should be construed differently from Parts 1 and III.

BIGGS, J. Despite the fact that the language of all three sections—I recall going over them in the second Seatrain case—are in haec verba—practically in haec verba.

Mr. DUMBAULD. That is true except for this mention of service that has been spoken of.

BIGGS, J. Yes. That is, the particular provision here in relation to revocation is only in Part II, but the language in respect to the issuance of certificates and basis upon which certificates shall issue. I would have very much less difficulty with the Commission's position here if it were not for the Smith Brothers case. There they say expressly that the certificate issued to a motor carrier is inviolable unless you proceed to revoke or suspend with some of the reasons given in 212 (a) or whatever it is; I have forgotten the section.

Mr. DUMBAULD. Yes; 212 (a).

BIGGS, J. Now you go forward to the carrier by water and you are also in the position of construing the very same sections in which Congress most undoubtedly has expressed itself, like the Commission, as being different in effect. Under Part II
131 the certificate is inviolable, as you put it, in accordance with the Commission's rulings, and the Commission, of course, is the expert body charged with the administration and construction of the Act; yet in Parts I and III you take the position that the Commission has not yet expressed itself on this, as I understand it, except in this very case that we have before us.

Mr. DUMBAULD. Well, the real question is to determine the significance of the silence of Congress in Parts I and III. Some court has said that frequently is like the pursuit of a mirage, but we say that when Congress is silent the Commission does have the power to correct their certificate, because that is an inherent attribute of any tribunal to correct its mistakes.

BIGGS, J. Then why did the Commission hold that Part II was inviolable?

Mr. DUMBAULD. That is because in Part II Congress was not silent, but had prescribed a specific statutory procedure which covered the field. In other words, it is the old rule that where there is a specific remedy like Workman's Compensation loss or something of that sort that that occupies the field and is the exclusive remedy for what is covered by the statutory provision.

132 BIGGS, J. Just think where that argument put us, puts you, and puts us all in view of the fact that Congress has given specific provisions concerning revocation, but insofar as Part I and Part III are concerned, where the language relating to the issuance of the certificate is precisely the same as in Part II, because there is no provision for revocation or suspension, why, then there is a right, and the certificate is inviolable; but in the other part it is not. The reason it is not is that Congress has seen fit to give a method of revocation or suspension.

Mr. DUMBAULD. That is right.

BIGGS, J. Is that a logical argument?

LEAHY, J. Well, that encompasses this proposition, does it not: That all water carriers who shall receive certificates under the grandfather clause may be called upon to explain what in fact is the scope of their activities, if the Commission is right in this instance.

Mr. DUMBAULD. Well, if there has been any inadvertence in the issuance of the certificate. In other words, I am not saying that they can revoke a certificate as a means of coercion.

LEAHY, J. I understand that, but do you go so far as to say

that they can ask them to come in and resubmit the data upon which they based their application under the grand-
133 father clause in order to see if you made an inadvertence?

In other words, did you arrive at the conclusion that there was inadvertence in this case prior to inviting Seatrain to come in and explain their position?

Mr. DUMBAULD. Yes. The inadvertence, as I see it, came up when the Commission became aware by its decision in the Foss case that "general commodities" might not include freight cars. They there held that freight cars were not included under "general commodities." Well, if that is true it immediately becomes clear in the Seatrain case that Seatrain has not been granted all that it should have been granted. In other words, under the interpretation of the Foss case Seatrain would not have been able to carry these freight cars which were ninety percent or practically all of its actual business, and Seatrain would have been granted less than it should have been granted; and so I can see why the Commission promptly would then want to bring the matter up for decision.

BIGGS, J. But you say the Commission corrects the situation by taking away that which it had given and then authorizes Seatrain to do that which we will assume, arguendo, it was entitled to do under the grandfather clause. Seatrain does not want that. Seatrain wants its original certificate: the original one.

134 Mr. DUMBAULD. Yes, sir.

BIGGS, J. You approach the proposition as if the Commission were bestowing some sort of boon on Seatrain.

Mr. DUMBAULD. That is right.

BIGGS, J. By withdrawing the old certificate and putting into effect the new one which greatly limits it. What Seatrain actually wants, I take it, is the use of the words "general commodities" without regard to whether or not they are freight cars or not, and then what is included in the amended certificate as well. It seems to me if Mr. Brush's position is to be sustained, that is what it has got to do.

Coming back to this question of inadvertence, you think when the Commission decided the Foss case they concluded——

Mr. DUMBAULD. That the Seatrain certificate was not broad enough to cover what Seatrain undoubtedly was entitled to have, and therefore the matter is reopened.

BIGGS, J. And therefore in reopening it they gave it what it was entitled to have, namely, transmission by cars, but did not give it what it had had before.

Mr. DUMBAULD. Yes.

LEAHY, J. As I understand your position, you say if they could have demonstrated a factual basis you would have given them the certificate they presently have.

135 Mr. DUMBAULD. That is right; only they were twice or more invited to submit testimony and failed to do so; so that I say actually, strictly speaking, it is not the Commission's fault if the certificate as it is now worded is narrow, and I also feel confident that if the question of law is decided the Commission will probably have another hearing on the matter of what actually should be in the certificate.

BIGGS, J. Don't you think the original certificate is pretty broad; broad enough to carry the use of cars? "That public convenience and necessity require the continuance of operations by Seatrain Lines, Inc., as a common carrier by self-propelled vessels, in interstate or foreign commerce, in the transportation of commodities generally between the ports of New York," and so forth. Do you feel that that is too narrow under the Foss case to include cars?

Mr. DUMBAULD. It is under the Foss case. Personally I am not sure that the Foss case was correctly decided by the Commission.

BIGGS, J. You don't think that was a further inadvertence, do you?

Mr. DUMBAULD. That would be improvident.

BIGGS, J. Coming back to this now, I am sorry I inter-
136 rupted you, but I think it may be shedding some light, but coming back to the business of inadvertence, assuming a mistake, the Commission did something which it should not have done, and two years later it decides it perhaps made a mistake and issues a rule to show cause, in effect stating that they perhaps made a mistake, "Come right in here and we will hear what you have to say about it," and Seatrain says, "No; we will fight for our original certificate; we will adhere to it; we won't come in," what language is there in the statute on which you rely and which would give the Commission the right to change its certificate now after it has been issued?

Mr. DUMBAULD. Well, just the provision that relates to orders. As Mr. LaRoe says, there may be a difference between an order and a certificate, but that is the specific language we have, and there is also this provision: He has discussed about attaching conditions and terms to the exercise of the privileges granted by the certificate. That is, those are specific statutory provisions which possibly cover the present case, and then there is also this argument which I make and which does not seem to impress the Court greatly, that where there has been a specific statutory, exclusive remedy established in Part II because of the necessity of using revocation as a means of coercion, that the silence of Congress
137 in Part I and III is to be given a different interpretation.

BIGGS, J. That argument may seem very impressive to the Court on mature reflection.

Mr. DUMBAULD. There is one other point that has been stressed a great deal by Mr. LaRoe, and that is the method of service or the type of containers or instrumentalities that the water carrier may use. Now, as I view it, that does not enter into the case here at all, because that has not been acted upon and that is not the question that is at issue. I view it as a commodity limitation, and I notice that on Page 20 of Mr. LaRoe's notes he admits that commodity limitations are proper under Part III of the Act and gives an example of a lumber carrier which, he says, if they carried only lumber they should be limited to lumber. In other words, the Commission does have the power to impose commodity limitations, and now when you come to the question of the commodities that they did give here I say you then have the question under the Foss case as to whether they gave Seatrain all that it was entitled to; and under the Foss case it would be necessary to reopen the Seatrain case, although personally I would probably have thought maybe the Foss case should have been decided the other way; but there too it is at least a question of doubt following the——

138 BIGGS, J. Do you have the citation of the Foss case?

Mr. DUMBAULD. I believe it is in Mr. LaRoe's notes.

BIGGS, J. Judge Leahy says it is in the majority opinion.

Mr. DUMBAULD. I believe so. This may be a very fine point, but in the original application of Seatrain where it says, "Are you applying for all commodities?" and there are certain places where you mark the application with an X, and as I examined that in the Commission's docket it appears to me that there is typed in on a different size of type so that it is apparently not a part of the mimeographed or photographed or whatever it is form that was used, is something that was added by Seatrain in filling out the application, and that is the words "permitted by law."

Now, since under the pertinent provision here a certificate should have been applied for, it seems to me it is possible to interpret the scope of the application itself as merely asking for such commodities as are permitted by law under the facts as proven, and the purpose of the grandfather clause would be to limit them to their past practice as shown by the proof.

139 LEAHY, J. Is that in the record, that original application?

Mr. DUMBAULD. Yes; it is the first item, I think, in the record. It was in the Commission docket and should be here, too.

BIGGS, J. I have no doubt it is included in that as an exhibit.

Mr. DUMBAULD. Yes, your Honor. Perhaps another similar refinement with regard to the corrected certificate, as I say, I don't intend to go into the scope as to the merits, whether they did

give a proper certificate that they should have done, but it is also possible to construe the certificate that was granted as meaning that the cars that are on the ship must have come from and be delivered to the rail carrier rather than that the property which is loaded in the cars must have come from a rail carrier and be delivered to a rail carrier. Now, if that is the correct construction of the new certificate, then all of the evils that have been foretold would disappear. As I say, I don't know just what the correct construction of that language is, but both views would be possible.

There is one more thing that Mr. LaRoe has touched upon, and that is the Fifth and Fourteenth amendments. I submit
140 that if a franchise is a contract then it ought to be subject to the equitable remedies of reforming the contract by proper administrative procedure where it has been erroneously and mistakenly entered into, and I don't think that the Fifth or Fourteenth amendments would apply, but that all that can be relied upon would be the impairment of obligations under the contract's clauses; and, incidentally, I don't agree with the idea that a certificate is a contract, because I think that is negatived by the fact that in another section of the Act it says that no certificate is deemed to give any proprietary right in any public waterways by any analogy to the similar provision in the motor carrier——

BIGGS, J. I have this certificate reprinted at Page 4 of Mr. LaRoe's notes. I am inclined to think, looking at it rather cursorily and on very brief examination, that Mr. Brush's interpretation and Mr. LaRoe's interpretation where it says "received from and delivered to," that that word "and" is conjunctive, of course; and suppose it should appear from Exhibit 1 that that is not in accordance with the actual New York-New Orleans operation as shown in the application for the grandfather certificate, and under the Rochester Telephone case I assume the right to review that would be quite clear. If that be the case, why shouldn't the order of the Commission be set aside as de-
141 priving the plaintiff of property without due process of law? Do you see my point?

Mr. DUMBAULD. I am afraid I don't.

BIGGS, J. If it appears on a comparison of the provisions of the amended certificate, the new certificate, and the old certificate that the new certificate so limits the plaintiff that it is in violation of the provisions of the grandfather clause of the Act as demonstrated by the record of what this company was actually doing on the grandfather date on its application for grandfather rights on the operation from New York to New Orleans, why, then, wouldn't the Court be justified in setting it aside as de-

priving the plaintiff of equal protection of the laws—that is, taking the Constitutional point, if there be one?

Mr. DUMBAULD. It seems to me that that is just stating in another way the question of whether the Commission's order is supported by evidence.

BIGGS, J. That is correct.

Mr. DUMBAULD. And the difficulty, as I see it, with the whole record in that respect is that there is nothing in the record except the self-serving statements in the application and perhaps the report of the field representative of the Commission. In other words, there was no actual hearing here.

BIGGS, J. My thought is perhaps the Commission may
142 have committed a further and second inadvertence—that is, assuming the first certificate to be inadvertence, and it is quite possible, it seems to me, in view of what Mr. Brush stated, and I am not at all certain that we have the right to consider his testimony—that perhaps there has been a further inadvertence in the use of the word "and." If it were "received from or delivered to rail carriers" a great deal of this may have been obviated. Perhaps that is inadvertent and is not in accordance with the actual showing made by the application.

Mr. DUMBAULD. But I still think that the findings made by the Commission in its report, both its original report of Division 4 and the report of the full Commission, are nevertheless entitled to the usual presumption——

BIGGS, J. Oh, certainly.

Mr. DUMBAULD. Even though they may be actually contrary to the real facts, because the plaintiff did not put in any evidence when invited to. I think for the purposes of review here the findings of the Commission must be treated as correct, if there is any evidence at all to support them.

BIGGS, J. Yes.

Mr. DUMBAULD. And I think, as has been read from the Commission's report, they found that during the grandfather
143 period it was limited to goods that were moved in these railroad cars, which I call the peculiar, unique Seatrain method.

BIGGS, J. There has been no question that Seatrain has laid some emphasis on that, which appears from the report of Seatrain on the operations. I have forgotten the citation of the Commission's report.

Mr. DUMBAULD. That brings me to the final point that with regard to the Texas City operations which are under the provision requiring proof of public convenience and necessity it seems to me there that we should accept the report of the Commission

that they gave great weight to this contention of Seatrain that it was an improvement in service and it enabled goods to move which otherwise could not have been moved which was unable to pay the higher rail rate, and so on, and therefore this unique Seatrain method of doing business warranted the Commission in finding public convenience and necessity for the extension of the operation; but that could well be limited to the service performed under the unique Seatrain method of doing business because there are plenty of other ordinary break-bulk steamship lines; and the Commission was under no duty to grant the application of a new carrier unless there were a showing of public convenience and necessity. So if all the evidence that there
144 was in support of the showing of public convenience and necessity was the showing made as to the superiority of this type of service due to the fact that they took the cars directly without breaking bulk and at a cheaper rate, which enabled goods to move that could not have moved otherwise, I think that the Commission's findings on the question of actual public convenience and necessity should likewise be supported.

I think that covers all the points that Mr. LaRoe has mentioned. However, as I say, in my view the only question that is here now is the naked question of law as to the power to correct a certificate inadvertently issued.

BIGGS, J. Mr. Reidy.

Argument of Mr. Reidy

Mr. REIDY. Your Honor, I just want a few minutes. I know you have been very patient in listening here all day. I have a very complete brief, anyway.

BIGGS, J. I don't think we have it before us.

Mr. REIDY. No, sir.

BIGGS, J. Mr. Dumbauld, do you have a brief ready?

Mr. DUMBAULD. No, your Honor.

BIGGS, J. Do you desire to file one?

Mr. DUMBAULD. I had not received the brief of plaintiff, and I thought perhaps we could have a reply brief.

Mr. REIDY. As I say, I am going to be very brief.
145 There are a few things that I think should be emphasized concerning the claim here of considerable expenditures and commitments following the issuance of the Commission's original certificate.

At page 50, which is the report on reconsideration of the entire Commission, it is pointed out that though repeatedly requested to specify to the Commission what those expenditures were, that there was no evidence introduced on that point, and the

only evidence that has been introduced is that which was here this morning, which we raised the question as to its admissibility.

BIGGS, J. We understand that, Mr. Reidy.

Mr. REIDY. It won't be necessary, I take it, to file a formal motion to strike.

BIGGS, J. You have already moved to strike. That will appear in the record.

Mr. REIDY. When the original certificate of Division 4 was issued on July 2, 1942, and it is set forth on page 71 of the petition, there is an ordering paragraph in there that the carrier is authorized to perform those operations subject to such terms and conditions and limitations as the Commission may from time to time hereafter attach to the issuance of the certificate. So
146 even at the time the original certificate was issued there was at least a warning that later on it might be necessary to look into it again.

I don't think you can eliminate entirely from this case the provisions of Section 309 (d). They are set forth in an appendix to my brief at page 54. The opening sentence of that section reads, "Such certificate shall specify the route or routes over which or the ports to and from which such carrier is authorized to operate, and at the time of the issuance and from time to time thereafter there shall be attached to the exercise of the privileges granted——

BIGGS, J. It won't be necessary for you to read that.

Mr. REIDY. There is a statutory authority conferred upon the Commission after the issuance of the certificate to impose conditions and limitations, and you will note that Congress said including certain things, which means that conceivably there may be other things that the Commission might also put in.

LEAHY, J. What is your interpretation of the proviso clause which appears in 309 (d) which was referred to by Mr. LaRoe; namely, that no terms, conditions, etc., shall restrict its equipment, facility, or service?

Mr. REIDY. I will answer your question this way:
147 A similar proviso in Part II was before the Supreme Court of the United States in the Crescent Express Lines case, which I think I have cited in my brief. In that case a motor carrier up here in New York was operating seven-passenger sedans from New York City to the Catskill Mountains, doing quite a little week-end business, and business was getting so good that they thought they would substitute busses for those six- or seven-passenger sedans, and they relied on this proviso. Well, the case went to the Supreme Court and the Supreme Court said, "Well, that means that you can add as many seven-passenger sedans to your operation as you wish, but you can't bring in a new service like you would if you were operating five busses as compared with a flex-

ible service like seven-passenger sedans." By that I mean I think they can add as many seatrain type of vessels as they want, but they can't go out and go into the break-bulk business.

It is also significant that in the argument before the Commission one of the Commissioners asked Mr. McCollester if his argument as to the Seatrain Lines were sound couldn't the Southern Pacific Steamship Company and the Bull Steamship Company and the Clyde Mallory Lines and all those other break-bulk lines
put rails on their vessels and transport traffic just like Sea-
148 train, and it was admitted that they could. If you are going to permit that, the Commission has a duty under the declaration of policy which I have set forth in this brief to administer all provisions of the Act in a fair and impartial manner so as to prevent break-downs in service, and it seems to me that the great break-bulk type of steamship lines being peculiar to themselves, and the Seatrain Lines being peculiar to itself, to permit one to encroach on the field of the other, it is at least arguable that under those circumstances that declaration of policy and the requirements thereof cannot be carried out by the Commission.

I want to emphasize in this connection that I think the Commission was not revoking this certificate. I consider a revocation as a complete obliteration of the thing, but they were merely clarifying and correcting it.

It is well settled under the grandfather clause—and you have had a number of them, Judge Biggs and Judge McLaughlin—that what they were entitled to was substantial parity as to what they were doing and what they proposed to do after the grandfather date—that is, the continuance of operations thereafter.

From 1932 on the operations of Seatrain Lines have been before
the Interstate Commerce Commission. We have had quite a
149 little litigation. Their operations were well described in many Commission reports which I quote in my brief, and that is what the Commission is giving them for the future in this case, and we think that is all they are entitled to. If they want to branch out into something more extensive than what they were doing on the grandfather date, they can file an application under Section 309 like any new operator can, and if they can prove public convenience and necessity secure such a certificate. Thank you, sir.

BIGGS, J. Mr. LaRoe.

Mr. LAROE. If your Honor please, the hour is so late that I shall not trespass more than just a very few minutes.

In the first place, there is one point that I meant to ask Mr. Brush that I will testify to myself; namely, you will recall that he said it was on December 31, 1943, that he entered into the contract for this Edgewater Colgate property. It was on January 2nd, three days later, that we received our first notice that the

Commission intended to do anything about our certificate. In other words, we had acquired all of that Colgate property before we even got an intimation.

BIGGS, J. Mr. Brush, did you hear Mr. LaRoe's statement?

150 Mr. BRUSH. That is correct, sir.

BIGGS, J. Very well.

Mr. BRUSH. That is the first notice we had.

BIGGS, J. We do not doubt the accuracy of what you say——

Mr. LAROE. It is better to have the record that way, sir.

BIGGS, J. But, after all, you can't testify out of your own knowledge.

Mr. LAROE. Thank you, sir.

Rebuttal argument of Mr. LaRoe

I have only one or two points to make in rebuttal: Here again at this argument it seems to me that to a large extent counsel for the opposition has relied on New Orleans and on grandfather rights. It is much easier for me to picture inadvertence as to New Orleans grandfather rights than it is to a proposed new operation to Texas City. On what theory would there be inadvertence as to Texas City if we proposed the service shown in the tariffs to Texas City, a broad proposition, common carriers generally, lighterage absorptions, trucking absorptions, everything? How can they say it was inadvertence as to Texas City? When they talk inadvertence they are thinking of holding us to grandfather

151 rights. We think they have got the grandfather rights all wrong. We are much narrower than we had been before; but then, too, I can't figure out how there can be any inadvertence as to the proposed service to Texas City, which was unrestricted.

May I also read from a decision which is a part of this record because we made it a part of the record by agreement with Commissioner Porter? I am quoting from page 122 of the Hoboken Divisions case, reported at 234 I. C. C., just to show you that if you take their own records they have not given us our grandfather rights. Judge Biggs referred to whether the record shows that they have not even given us our grandfather rights through inadvertence or otherwise. May I read it to you?

"Seatrain so-called lighterage traffic is not interchanged with complainant," which means the little railroad, "but is handled by complainant between the car cradle and Seatrain's pier, and so forth, a maximum distance of about four hundred feet as Seatrain's agent." In other words, that is not really interchange business; that is just the local switch which they make as our agent.

Now, it goes on to say that complainant shows that during the last ten months of 1937 its total charge to Seatrain for this service was $1,196, which indicates that such movement consisted of 478 carloads.

152 Now, Mr. McCollester has made a calculation based on the preceding pages of this report, which indicates that that 478 carloads of lighterage business was ten percent or close to it of the total number of cars interchanged, which is shown in their report as some five thousand cars.

Now, we can't handle that lighterage business under this certificate, so that they have not given us—it can't be handled without transfer, so that they have not given us our right to handle the traffic which they admit we handled.

And so I could go on with other pages from our brief. I don't want to do that, but they refer to our port-to-port traffic in these other decisions, seemingly regarding it as important, but we can't handle it. So if you take the very face of their own decisions they have not even given us the grandfather rights as to that.

How can they use grandfather rights lawfully as a necessary yardstick for public convenience and necessity to Texas City where our proposed service was unlimited?

Biggs, J. I really believe you are reiterating your previous argument.

Mr. LaRoe. I plead guilty, and I am sorry.

Biggs, J. This is not an ordinary case to grasp, and I for

153 one have not grasped it. Is there anything that you would like to add?

Mr. LaRoe. Yes; I shall try to avoid anything cumulative. I do want to make clear that as to inadvertence I did not answer you as fully as I should have this morning. I want to make it unmistakably clear that we would be here even if there were no inadvertence, because the issue which we want to determine here goes far deeper than inadvertence. What we want to determine here is the extent of the Commission's power to revoke an essential part of a franchise, the power of the Commission to impose service methods on a certificate.

I won't take much time to argue with Mr. Dumbauld or Mr. Reidy on their propositions about the Crescent case, but Mr. Reidy's point proves my point, which is that whereas in the Motor Carrier Act, and that is what the Crescent case was, the Commission has that power to impose service conditions expressly by the terms of the statute, but when it comes to water carriers it is silent, and I just can't believe that the Court is going to hold, as Mr. Dumbauld tried to prove, and it is the fire time in my life I ever heard of such an argument on that point, namely, that there is

more delegation of statutory power when Congress is silent than when Congress acts. I just can't see that.

154 LEAHY, J. There is an article in the Harvard Law Review on "The Silences of Congress" by Henry Wolfe Bikle.

BIGGS, J. What do you think is the effect of the Foss case on your original certificate, assuming there was no new certificate?

Mr. LAROE. The Foss case I don't think has any effect at all on our original certificate. The service involved in that case was only on Puget Sound. It was a little car ferry case, and the Commission recently, I think just a few days ago, authorized them specifically to handle freight in railroad cars to clear up any doubt on that; but our certificate is broad enough to enable us to carry anything under the sun except with the qualification of the words "permitted by law."

BIGGS, J. You think it is broad enough to carry loaded or unloaded freight cars?

Mr. LAROE. Oh, absolutely. We can handle anything in any manner that a water carrier can possibly handle freight under that certificate. A freight car is not a commodity. The commodities are in the freight car. A barrel is not a commodity. When you ship a barrel of sugar the barrel is part of the sugar. It is not a commodity. As a matter of fact, when you ship a

155 barrel of sugar you pay freight rates on the barrel as sugar. They don't regard the barrel as the commodity.

Our tariff does not mention that we will handle stuff in railroad cars. We handle sugar, we handle molasses, we handle clothing. In fact, nowhere do we say we will handle freight only in railroad cars.

LEAHY, J. Does the shipper designate it?

Mr. LAROE. He leaves it up to the carrier. There is nothing in the contract to suggest cars or in any part of the transaction.

The only point I want to make in conclusion is that I hope that this matter can be adjudicated in such a manner—and I hope it is not presumptuous for me to make this suggestion—that the water carrier industry will know where it stands as to the field of outstanding certificates. The Merchant Marine of our country and I think those engaged in constituting it have a right to know where their certificates stand. I can't think of anything that would be more serious from that standpoint than a feeling on the part of investors and entrepreneurs that the Commission can at any time, whether for inadvertence or otherwise, attach conditions which take away a fundamental part of the grant itself. Thank you very much.

BIGGS, J. Mr. Dumbauld, how long a time do you need
156 for your brief?

Mr. DUMBAULD. I would suggest twenty days.

BIGGS, J. Have you any objection to that length of time, Mr. LaRoe?

Mr. LAROE. No, sir. May I ask the Court whether the Court will permit ten days for a reply brief?

BIGGS, J. Yes. There will be twenty days for Mr. Dumbauld's brief and ten days for a reply brief.

Mr. DUMBAULD. Thank you.

Mr. REIDY. The certificate in this case is to be issued on August 21st. Did you want to bring that up?

BIGGS, J. Yes; I meant to ask that question. I doubt very much our ability to get this out. We won't have the briefs for thirty days, which will be the 20th of August.

Mr. REIDY. I would be willing to recommend to the Commission any suggestion of the Court.

BIGGS, J. I think Judge Leahy's suggestion is a sensible one. Would you suggest to the Commission that the members of the Court would appreciate it if they would grant a sixty-day extension beyond the effective date of the order?

Mr. REIDY. Beyond August 21st?

BIGGS, J. Sixty days beyond August 21st. I think certainly we should have the situation disposed of on or before
157–160 that time.

Mr. REIDY. If during that time you think you need more time, we will be glad to entertain it.

BIGGS, J. We will communicate with you.

(At this point the hearing was adjourned.)

161 *Plaintiff's Exhibit No. 1*

Docket No. W543. Filed May 29, 1941. Interstate Commerce Commission.

APPLICATION FOR ☒ CERTIFICATE AS COMMON CARRIER BY WATER ☐ PERMIT AS CONTRACT CARRIER BY WATER SUBJECT TO THE INTERSTATE COMMERCE ACT

(Before answering, read general instructions attached hereto)

BEFORE THE INTERSTATE COMMERCE COMMISSION

Application of Seatrain Lines, Inc., a Delaware Corporation, 39 Broadway, New York, New York.

Application below is for the appropriate authority to (check applicable status):

☒ to continue an operation in existence January 1, 1940, and continuously thereafter ☐ to continue an operation not existing January 1, 1940, but existing February 1, 1941	as a	☒ common carrier ☐ contract carrier	of ☒ passengers ☒ property

by water in interstate or foreign commerce (as defined in section 302 (i)).

Application for certificate as common carrier of property covers ☒ all commodities permitted by law ☐ commodities with exceptions as detailed in Exhibits "A" or "B".

Application for a contract carrier permit of property covers ☐ all commodities with exceptions as detailed in Exhibits "A" or ☐ "B" specific commodities as detailed in Exhibits "A" or "B".

Application covers ☒ regular routes ☐ irregular routes.

162 Operation is ☒ year around ☐ seasonal between _____ (Month) and _____.

In support of this application, applicant submits the following exhibit attached hereto and made a part hereof: ☒ Exhibit "A". ☐ Exhibit "B" (See General Instructions).

Applicant will furnish such additional information to substantiate the applicant's prayer as the Commission may require.

Applicant has complied with the order of the Commission relative to the service on interested parties, as shown below.

Applicant reserves the right to claim exemption from any and all provisions of Part III of the Interstate Commerce Act, the filing of this application not being deemed a waiver thereof, and the operations, if any, which applicant believes to be exempt are those described below:

(If exemption is claimed in respect of any operations applicant should here describe such operations, and in each instance make reference to the statutory provision or provisions under which the exemption is claimed.)

Wherefore, the applicant herein prays: That the Commission issue a Certificate to operate as a Common carrier of passengers and property generally and applicant further prays that if the facts herein contained show that applicant, although applying

for a Certificate is entitled to a permit, this application be considered one for the appropriate form of authority.

Dated this 28th day of May 1941.

SEATRAIN LINES, INC.,
By E. K. MORSE,
(Title) *Vice President.*

163 OATH

STATE OF NEW YORK,
County of New York, ss:

E. K. Morse makes oath and says that he is the Vice President of Seatrain Lines, Inc.; that he is authorized on the part of said applicant to verify and file with the Interstate Commerce Commission this application and exhibits attached hereto and made a part hereof; that he has carefully examined all of the statements contained in such application and the exhibits attached thereto and made a part thereof; that he has knowledge of the matter set forth therein, and that all such statements made and matters set forth therein are true and correct to the best of his knowledge, information, and belief.

E. K. MORSE.

Subscribed and sworn to before me, a Notary Public in and for the State and county above named, this 28th day of May 1941.

[SEAL] BLANCH C. WELCH,
Notary Public.

New York County Clerk's No. 103; New York County Register's No. 3 W 5.

My commission expires March 30, 1943.

CERTIFICATE OF SERVICE

A copy of this application has been served by receipted mail on the Governors of the following States: New York, New Jersey, Louisiana.

A notice of the filing of this application (Form B. W. C. 5) has been served by receipted mail on the following known waterline competitors: Pan-Atlantic Steamship Corporation, Southern Steamship Company, Southern Pacific Company (Southern Pacific Steamship Lines "Morgan Line"), The Bull Steamship Line.

Postal receipts or certificates of mailing covering the above are attached hereto.

Date May 28th, 1941. (Signed) E. K. MORSE.

164 *Exhibit "A"*

(This exhibit to be filled out by applicants for common carrier certificates or contract carrier permits claiming status under

the provisos of section 309 (a) or 309 (f) of the Interstate Commerce Act.)

(Name of Applicant) Seatrain Lines, Inc.

Except as otherwise noted, the following information is to be as of January 1, 1940. The information given should, where necessary, cover a sufficient period prior to such date to give a clear and fair picture of the nature and extent of the business of applicant which properly should be covered by the certificate or permit sought. Wherever changes in the nature or extent of the operation have been made since January 1, 1940, they should be clearly indicated.

DESCRIPTION OF TRANSPORTATION SERVICE, ROUTES, PORTS SERVED REGULARLY AND IRREGULARLY, AND OTHER PERTINENT INFORMATION

1. Description of transportation service:

A. Applicant (or predecessor in interest) was engaged in the business of transporting, in interestate or foreign commerce: (1) ☒ Commodities generally. (2) ☐ Commodities generally, except _____
(Indicate exceptions, either specifically or by their general nature)
(3) ☐ Special commodities _____
(Indicate specifically commodities transported)
(4) ☒ Passengers.

B. Applicant (or predecessor in interest) undertook to transport passengers or property for the general public for hire. Yes. If answer is "No," state for whom applicant (or predecessor in interest) transported since January 1, 1940, or prior thereto, under special contracts or agreements:

	Name	*Address (Street, City, and State)*	*Written or Verbal Contract or Agreement and Date Thereof*
(1)			
(2)			
(3)			
(4)			
(5)			
(6)			

	Commodity Covered	*Volume Agreed to be Transported*	*Duration of Contract or Agreement*
(1a)			
(2a)			
(3a)			
(4a)			
(5a)			
(6a)			

(NOTE: Lines (1a), (2a), (3a), etc., are a continuation respectively of the same contract referred to on lines (1), (2), (3), etc.)

165 C. Applicant (or predecessor in interest) has continued to operate as above stated without any change in the transportation service as described above and is now so operating. Yes. If answer is "No", state in detail character and extent of such change in service _____

_____

_____

D. If the changes indicated in the answer to (C) above represent interruptions of transportation service since January 1, 1940, caused by conditions over which applicant (or predecessor in interest) had no control, give facts and reasons clearly and in detail. Not applicable.

E. Applicant (or predecessor in interest) is engaged in furnishing seasonal transportation only. No. If the answer is "Yes," state the limits of the seasonal operation, naming month of commencement and month of cessation. _____

If the above seasonal period does not include January 1, 1940, was applicant (or predecessor in interest) rendering above service during the seasonal period ending prior to that date? _____
(Yes or No)

Was applicant (or predecessor in interest) providing same service during seasonal period subsequent to January 1, 1940?_____
(Yes or No)

Outline fully any changes in character and extent of service between seasonal operation including, or prior to, January 1, 1940, and subsequent seasonal operation:_____

_____

_____

_____

II. Description of Routes:

A. Regular Routes: Ports or points to or from which applicant (or predecessor in interest) regularly operated as of January 1, 1940, or prior thereto, and number of revenue calls at each between January 1, 1940, and date of application: A regular weekly service (inaugurated in 1932) in each direction between the Port of New York and the Port of New Orleans, via Havana, Cuba, or direct. 74 revenue calls at New York, 74 revenue calls at New Orleans, between dates mentioned.

B. Irregular Routes: Ports or points to or from which applicant (or predecessor in interest) offered occasional but irregular service as of January 1, 1940, or prior thereto, and number

166 of revenue calls at each beetween January 1, 1940, and date of application:

C. Has applicant (or predecessor in interest) acquired by purchase or otherwise a route or routes since January 1, 1940? No. If so, attach statement, properly designated, giving, for each such route, the information requested in A and B above, also name and address of predecessor. Attach copy of purchase agreement, or other documents, evidencing the acquisition of each such route or routes.

D. Does applicant apply for rights over any route or routes operated by others under agreement? No. If so, attach statement, properly designated, giving, for each route, the information requested in A and B above, also name and address of operator. Attach copy of charter, operating contract, or other agreement.

E. Does applicant apply for rights over any route or routes over which it operates ships owned by others under charter, contract, or other agreement? No. If so, attach statement, properly designated, giving, for each such route, the information requested in A and B above, also name and address of the other party to such charter, contract, or agreement. Attach copy of such charter, contract, or agreement.

F. Has applicant (or predecessor in interest) abandoned or disposed of by sale or otherwise any route or routes since January 1, 1940? No. If so, attach statement, properly designated, giving, for each such route, the information requested in A and B above, the manner and date of disposition, and the name and address of successor, if any. Attach copy of the sales agreement or other documents evidencing such disposal.

G. Were operations on any of the above routes or parts of such routes covered by answer to questions C, D. E, or F reasonal? Not applicable. If so, attach statement, properly designated, giving facts clearly and in detail, showing applicant's customary operation (or that of predecessor in interest), including months of normal operating season.

H. If applicant (or predecessor in interest) is subject to Part III of the Interstate Commerce Act in transportation of passengers or property in interstate or foreign commerce only by reason of participation in through routes and joint rates, name carriers with whom such traffic was interchanged as of January 1, 1940, or prior thereto, and interchange points: Not applicable.

167 State clearly any changes since January 1, 1940: None.

III. Description of equipment:

A. Total number of vessels in commission and operated by applicant (or predecessor in interest) as a common or contract carrier on January 1, 1940, including vessels owned, chartered, or leased from others. 3.

(1) Number of owned vessels operated by applicant (or predecessor in interest) 3.

(2) Number of vessels under charter to applicant (or predecessor in interest) 0.

(Answers to (1) and (2) should total answer to (A))

B. Number of vessels owned by applicant (or predecessor in interest) and under charter to others on January 1, 1940. 0.

C. Total number of vessels in commission and operated by applicant (or predecessor in interest) as a common or contract carrier on date of this application, including vessels owned, chartered, or leased from others 5.

(1) Number of owned vessels operated by applicant (or predecessor in interest) 5.

(2) Number of vessels under charter to applicant (or predecessor in interest) 0.

(Answers to (1) and (2) should total answer to (C))

D. Number of vessels owned by applicant (or predecessor in interest) and under charter to others on date of this application. 0.

IV. Dual Operations:

A. Is applicant (or predecessor in interest) controlled by a person who has filed or intends to file a separate application for a certificate as a common carrier by water or a permit as a contract carrier by water? No. If answer is "Yes", state name and address of such person, and whether such person is applying for a common carrier certificate or contract carrier permit.

Was applicant (or predecessor in interest) so controlled on January 1, 1940? No.

B. Does applicant (or predecessor in interest) control a person who has filed or intends to file a separate application for a certificate as a common carrier by water or a permit as a con-

168 tract carrier by water? No. If answer is "Yes", state name and address of such person, and whether such person is applying for a common carrier certificate or contract carrier permit. ----------

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Did applicant (or predecessor in interest) control such person on January 1, 1940? No

C. Is applicant (or predecessor in interest) under common control with a person who has filed or intends to file a separate application for a certificate as a common carrier by water or a permit as a contract carrier by water? No. If answer is "Yes", state name and address of such person, and whether such person is applying for a common carrier certificate or contract carrier permit.

Was applicant (or predecessor in interest) under such common control on January 1, 1940? No

V. Evidence of Operation:

A. Applicant submits the following evidence as proof of its operations (or those of predecessor in interest) as of January 1, 1940: Affidavit of Vice-President of Seatrain Lines, Inc. (See Exhibit C): Sailing list of Seatrain Lines, Inc. as of January 1, 1940. (See Exhibit D.)

(Applicant should list above the documents it is attaching in the form of affidavits, bills of lading, schedules, or other documents which it believes sufficiently prove the maintenance of service as stated.)

B. Applicant submits the following evidence as proof of its operations (or those of predecessor in interest) on the date of this application: Affidavit of Vice-President of Seatrain Lines, Inc. (See Exhibit C); Sailing list of Seatrain Lines, Inc. as of date of this application. (See Exhibit E.)

(Applicant should list above the documents it is attaching in the form of affidavits, bills of lading, schedules, or other documents which it believes sufficiently prove the maintenance of service as stated.)

169 Form B. W. C. 2.

Exhibit "B"

(This exhibit to be filled out by applicants for common carrier certificates or contract carrier permits who were in operation on February 1, 1941, but not claiming status under the provisos of section 309 (a) or 309 (f) of the Interstate Commerce Act.)

(Name of Applicant)

Except as otherwise noted, the following information is to be as of the date of filing application. The information given should, where necessary, cover a sufficient period prior to such date to give a clear and fair picture of the nature and extent of the business of applicant which properly should be covered by the certificate or permit sought.

DESCRIPTION OF TRANSPORTATION SERVICE, ROUTES, PORTS SERVED REGULARLY AND IRREGULARLY, AND OTHER PERTINENT INFORMATION

I. Description of Transportation Service:

A. Applicant is engaged in the business of transporting, in interstate or foreign commerce: (1) Commodities generally. (2) Commodities generally, except _____ (Indicate exceptions, either specifically or by their general nature)

(3) Special commodities _____ (Indicate specifically commodities transported)

(4) Passengers.

B. Applicant undertakes to transport passengers or property for the general public for hire _____ (Yes or No) If answer is "No," state for whom applicant has transported under special contracts or agreements:

	Name	*Address (Street, City and State)*	*Written or Verbal Contracts or Agreement and date thereof*
(1)			
(2)			
(3)			
(4)			
(5)			
(6)			

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	Commodity covered	*Volume Agreed to be transported*	*Duration of contract or agreement*
(1a)			
(2a)			
(3a)			
(4a)			
(5a)			
(6a)			

(Note—Lines (1a), (2a), (3a), etc. are a continuation respectively of same contract referred to in lines (1), (2), (3), etc.)

C. Applicant is engaged in furnishing seasonal transportation only. _____ If the answer is "Yes", state the limits of the seasonal operation naming month of commencement and month of cessation.
(Yes or No)

If the above seasonal period does not include February 1, 1941, was applicant rendering above service during the seasonal period ending prior to that date? _____
(Yes or No)

D. If applicant was not engaged in furnishing seasonal transportation, name date operation commenced.

II. Description of Routes:

A. Regular Routes: Ports or points to or from which applicant was regularly operating as of February 1, 1941, or prior thereto, and number of revenue calls at each between date operation commenced and date of application:

B. Irregular Routes: Ports or points to or from which applicant offered occasional but irregular service as of February 1, 1941, or prior thereto, and number of revenue calls at each between date operation commenced and date of application:

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C. If applicant is subject to Part III of the Interstate Commerce Act in transportation of passengers or property in interstate or foreign commerce only by reason of participation in through routes and point rates, name carriers with whom such traffic is interchanged and interchange points:

III. Description of Equipment:

A. Total number of vessels in commission and operated by applicant as a common or contract carrier on February 1, 1941, including vessels owned, chartered, or leased from others _____

(1) Number of owned vessels operated by applicant_____

_____

(2) Number of vessels under charter to applicant_____

_____

(Answers to (1) and (2) should total answer to (A))

B. Number of vessels owned by applicant and under charter to others on February 1, 1941_____

C. Total number of vessels in commission and operated by applicant as a common or contract carrier on date of this application, including vessels owned, chartered, or leased from others.

_____

(1) Number of owned vessels operated by applicant_____

_____

(2) Number of vessels under charter to applicant_____

_____

(Answers to (1) and (2) should total answer to (C)).

D. Number of vessels owned by applicant and under charter to others on date of this application_____

172 IV. Dual Operations:

A. Is applicant controlled by a person who has filed or intends to file a separate application for a certificate as a common carrier by water or a permit as a contract carrier by water?_____
(Yes or No)

If answer is "Yes", state name and address of such person, and whether such person is applying for a common carrier certificate or contract carrier permit.

_____

_____

B. Does applicant control a person who has filed or intends to file a separate application for a certificate as a common carrier by water or a permit as a contract carrier by water?_____ If answer
(Yes or No)

is "Yes", state name and address of such person, and whether such person is applying for a common carrier certificate or a contract carrier permit.

_____

_____

C. Is applicant under common control with a person who has filed or intends to file a separate application for a certificate as a common carrier by water or a permit as a contract carrier by

water?_____ If answer is "Yes", state name and address of such
(Yes or No)
person, and whether such person is applying for a common carrier certificate or contract carrier permit.

V. Evidence of Operation:

A. Applicant submits the following evidence as proof of its operations as of February 1, 1941:

(Applicant should list above the documents it is attaching in the form of affidavits, bills of lading, schedules, or other documents, which it believes sufficiently prove the maintenance of service as stated.)

B. Applicant submits the following evidence as proof of its operations on the date of this application:

173 (Applicant should list above the documents it is attaching in the form of affidavits, bills of lading, schedules, or other documents, which it believes sufficiently prove the maintenance of service as stated.)

VI. Evidence of Qualifications:

A. Applicant for common carrier certificate submits the following evidence as proof that it is fit, willing, and able properly to perform the service proposed, and to conform to the provisions of Part III of the Interstate Commerce Act, and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent authority is sought, is or will be required by the present or future public convenience and necessity.

(Applicant should list the documents it is attaching hereto which it believes sufficiently prove that the operation for which the common carrier certificate is sought will meet the above requirements. The documents must include the following:

(1) A statement of assets and liabilities, or if a newly organized corporation a statement of proposed capitalization and method of financing.

(2) If applicant has been in operation an income statement and profit and loss statement for the period of its operation; in the event the operation is such as to come under the Interstate Commerce Act, as amended, only in part, give a segregated profit and loss statement for such operation coming within the provisions of the Act, indicating the method of segregation.

(3) A statement containing brief description of the experience of the principal officers and operating personnel.

(4) An estimate of the available traffic and applicant's expected handling by classes of commodities or by number of passengers, and the prospective revenue and income from all traffic which applicant expects to handle.

(5). A statement of whether applicant's operation will be for the benefit of particular industries.

(6) A list of the known water carrier competitors now giving service between the ports which applicant proposes to serve.

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174 B. Applicant for contract carrier permit submits the following evidence as proof that it is fit, willing, and able properly to perform the service proposed and to conform to the provisions of Part III of the Interstate Commerce Act, and the requirements, rules, and regulations of the Commission thereunder, and that such operation will be consistent with the public interest and the national transportation policy declared in the act.

(Applicant should list the documents it is attaching hereto which it believes sufficiently prove that the operation for which the contract carrier permit is sought will meet the above requirements. The documents must include the following:)

(1) A statement of assets and liabilities, or if a newly organized corporation a statement of proposed capitalization and method of financing.

(2) If applicant has been in operation an income statement and profit and loss statement for the period of its operation; in the event the operation is such as to come under the Interstate Commerce Act, as amended, only in part, give a segregated profit and loss statement for such operation coming within the provisions of the Act, indicating the method of segregation.

(3) A statement containing brief description of the experience of the principal officers and operating personnel.

(4) An estimate of the available traffic and applicant's expected handling by classes of commodities or by number of passengers, and the prospective revenue and income from all traffic which applicant expects to handle.

(5) A statement of whether applicant's operation will be for the benefit of particular industries.

(6) A list of the known water carrier competitors now giving service between the ports which applicant proposes to serve.

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175 Form B. W. C. 2.

GENERAL INSTRUCTIONS

Application should be carefully and completely filled out by typewriter, each copy of the application being an original and not a carbon copy. In the event that applicant finds it more convenient to print or duplicate by mimeograph, multigraph, planograph, or photograph, the entire application must exactly follow the prescribed form in all respects. Answers to questions must be double-spaced, leaving a left-hand margin of not less than 1½ inches. All statements or additional exhibits attached to the application must conform as nearly as possible to the size of the prescribed application form and must be on paper weighing not less than 16 pounds to the ream, with left-hand margin not less than 1½ inches wide. Each statement or additional exhibit attached must be clearly identified and must be double-spaced, if typewritten. If applicant elects to print application and answers the printing must be in 10 or 12 point type on good unglazed paper.

If space provided in the blank form is not sufficient, the answer should be prepared on a separate sheet of paper and attached as Exhibit "C" (or "D", "E", etc.) In the blank space reference to the exhibit should be made by stating: "See Exhibit 'C'" etc.

Additional copies of the appropriate application form and of Form B. W. C. 5 may be obtained if needed by applicants from the Bureau of Water Carriers, Interstate Commerce Commission, Washington, D. C.

The application form is for use of both applicants for common carrier certificates or for contract carrier permits. The application form also provides for an alternative prayer that in the event the facts contained in the application and accompanying exhibits show that the applicant, although applying for a ---------- (Certificate) (Permit) is entitled to a ---------- (Permit) (Certificate), the application is to be considered one for the appropriate form of authority.

This application should be filed as a protective measure even though exemption from the Act is claimed. The filing of the application and accompanying exhibits will not be deemed a waiver of any rights of applicant to such exemption.

The application form provides for the submission of two alternative exhibits, viz, Exhibit "A" and Exhibit "B". Exhibit "A" is to be filled out by applicants for common carrier certificates or contract carrier permits claiming status under the provisos of section 309 (a) or 309 (f), respectively, as quoted below:

As to common carriers by water:

SEC. 309 (a) * * * Provided, however, That subject to section 310, if any such carrier or a predecessor in interest was in bona fide operation as a common carrier by water on January 1, 1940, over the route or routes or between the ports with respect to which application is made and has so operated since that time (or, if engaged in furnishing seasonal service only, was in bona fide operation during the seasonal period, prior to or including such date, for operations of the character in question) except, in either event, as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission as provided in subsection (b) of this section and prior to the expiration of one hundred and twenty days after this section takes effect. Pending the determination of any such application, the continuance of such operation shall be lawful. If the application for such certificate is not made within one hundred and twenty days after this section takes effect, it shall be decided in accordance with the standards and procedure provided for in subsection (c), and such certificate shall be issued or denied accordingly.

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As to contract carriers by water:

SEC. 309 (f) * * * Provided, That, subject to section 310, if any such carrier or a predecessor in interest was in bona fide operation as a contract carrier by water on January 1, 1940, over the route or routes or between the ports with respect to which application is made, and has so operated since that time (or, if engaged in furnishing seasonal service only, was in bona fide operation during the seasonal period, prior to or including such date, for operations of the character in question) except, in either event, as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such permit, without further proceedings, if application for such permit is made to the Commission as provided in subsection (g) of this section and prior to the expiration of one hundred and twenty days after this section takes effect. Pending the determination of any such application, the continuance of such operation shall be lawful. If the application for such permit is not made within one hundred and twenty days after this section takes effect, it shall be decided in accordance with the standards and procedure provided for in the subsection (g), and such permit shall be issued or denied accordingly.

Applicants for common carrier certificates or contract carrier permits who do not claim status under the above provisos, but

who were in operation on February 1, 1941, should fill out Exhibit "B" and attach to the application.

Applicant must serve by receipted mail a copy of the application on the Governor of each State in which is located a port or point served, and must notify by mailing a filled out notice (Form B. W. C. 5) by receipted mail to each known water-line competitor in the same trade route or routes. Applicant should also in the proper space in his application list the parties on whom such copies of application have been served and the parties on whom such notices have been served. Applicant should obtain receipts from the Post Office for the notices of mailing under the following Post Office regulation:

Upon request and payment of 1 cent for each piece of ordinary
mail of any class, the sender will be furnished a receipt
177 or Certificate of Mailing. This fee carries with it no
insurance or indemnity and no return receipt is obtained from the addressee.

These receipts or certificates of mailing must be attached to the original application filed with the Commission.

The original of this application, properly signed and sworn to before a notary public, and two additional copies must be returned to: The Interstate Commerce Commission, Bureau of Water Carriers, Washington, D. C.

After the filing of the application, the applicant will be notified by the Commission of all subsequent proceedings.

178 *Exhibit C*

STATE OF NEW YORK,
County of New York, ss:

E. K. Morse, being duly sworn, deposes and says as follows:

I am an officer of applicant, Seatrain Lines, Inc., being Vice-President thereof, and for many years I have been and am now connected with and thoroughly familiar with the business and operations of said company.

Since October 1932, and continuously thereafter, including on or about January 1, 1940 and without interruption since that time, applicant has operated a weekly transportation service as a common carrier by water between the port of New York and the port of New Orleans, Louisiana, generally via Havana, Cuba, its terminal at the port of New York being at Hoboken, New Jersey, and its terminal at New Orleans, Louisiana, being at Belle Chasse, Louisiana.

In the operation of this weekly service applicant has been engaged as a common carrier by water in the transportation of freight generally in interstate commerce between the port of

New York and the port of New Orleans and in connection with common carriers by rail has also been engaged in the transportation of freight over through routes by rail and water, water and rail, and rail, water and rail between points in Eastern Trunk Line, New England, and Central Freight Association territories, including New York Harbor, on the one hand, and points in the South and Southwest, including New Orleans, Louisiana, on the other hand.

For such transportation applicant has published and maintained, as required by law, tariff schedules naming a full line of class and commodity rates applicable to the transportation described and by such tariff schedules has held itself out to the general public as a common carrier by water to accept and transport freight of all kinds in accordance with the rules, regulations, and rates provided in said tariffs, subject to the legal rights, ob-
179 ligations, and limitations governing transportation by common carriers by water. As proof thereof, reference is made to the following tariff schedules, among others, published and filed with this Commission by or on behalf of applicant, in which are named rates, rules, and regulations for the transportation of freight of all kinds via its line.

Seatrain Lines, Inc., I. C. C. Nos. 10, 15, 20, 31 and 38.
Agent J. M. King's I. C. C. No. 3.
Agent F. D. Miller's I. C. C. No. 401.
Agent J. R. Peel's I. C. C. No. 3288, 3296 and 3367.
Agent W. S. Curlett's I. C. C. No. A–677.
Denver & Rio Grande Western R. R. I. C. C. No. 700.

As further proof that applicant was engaged on or about January 1, 1940, in operation as a common carrier for the purposes of the transportation described and is so engaged at the present time, reference is made to sailing schedules attached hereto and made a part hereof, showing published sailings of applicant's vessels, which were actually performed in accordance therewith. (See Exhibits D and E.)

As further proof that applicant was engaged in operation as a common carrier by water between the ports and over the routes described on January 1, 1940 and has been so engaged continuously since that time, reference is made to the findings of the Interstate Commerce Commission in the following proceedings, among others, and to the evidence before the Commission in those proceedings:

Investigation of Seatrain Lines, Inc., Docket No. 25565, 195 I. C. C. 215 (July 11, 1933);

Investigation of Seatrain Lines, Inc., Docket No. 25565 and allied cases, 206 I. C. C. 328 (February 5, 1935);

Seatrain Lines, Inc. v. The Akron, Canton & Youngstown Railway Company, et al., Docket No. 25727 and allied cases, 226 I. C. C. 7 (January 28, 1938);

Hoboken Manufacturers Railroad Company v. The Arkon, Canton & Youngstown Railway Company, et al., Docket No. 27630, 234 I. C. C. 114 (July 24, 1939);

180 Hoboken Manufacturers Railroad Company v. Abilene & Southern Railway Company, et al., Docket No. 25728 and allied cases, 237 I. C. C. 97 (January 8, 1940);

Seatrain Lines, Inc. v. The Akron, Canton & Youngstown Railway Company et al., Docket No. 25727 and allied cases, 243 I. C. C. 199 (December 23, 1940);

Application of Missouri Pacific Railroad Company and Texas & Pacific Railway Company under Section 5 (19–21) of Interstate Commerce Act, Docket No. 25546 (April 8, 1941).

In addition to being a common carrier by water of freight in interstate commerce, applicant has held itself out and on January 1, 1940 and continuously since that time has been engaged as a common carrier by water of passengers and has been in operation as such between the port of New York and the port of New Orleans, generally via Havana, Cuba. Its vessels are equipped with passenger accommodations for two people. Generally the passengers carried have been applicant's officers or employees. However, subject to prior reservation only and only to the limit of its capacity, applicant has held itself out to transport other passengers for hire and has so transported passengers for hire as a common carrier. As proof of its undertaking, reference is made to the following common carrier tariff schedules of passenger charges on file with the United States Maritime Commission: S. B. No. P-1 (Note).

NOTE.—This tariff was cancelled effective February 7, 1941.

As further proof of applicant's operation as a common carrier of passengers, attached hereto are sample passenger manifests showing passengers carried for hire on applicant's vessels. (See Exhibit F.)

E. K. MORSE.

Subscribed in my presence and sworn to before me by the affiant above named this 28th day of May 1941.

BLANCHE C. WELCH,
Notary Public.

181 *Exhibit D*

SEATRAIN LINES, INC.
39 BROADWAY, NEW YORK, N. Y.

Carloads (on break Bulk Service). Less Carloads (Domestic Railroad Packing).

Issued Sept. 20, 1939. Telephone: DIgby 4-8673.

SAILING SCHEDULE

(Subject to change without notice)

1939—SOUTH-BOUND—1940

Voyage No.	Steamer	Lv. New York Every Wednesday	Arr. & Lv. Havana Every Sunday	Arr. New Orleans Every Tuesday
179	Seatrain Havana	Oct. 11	Oct. 15	Oct. 17
182	Seatrain New York	Oct. 18	Oct. 22	Oct. 24
180	Seatrain Havana	Oct. 25	Oct. 29	Oct. 31
183	Seatrain New York	Nov. 1	Nov. 5	Nov. 7
181	Seatrain Havana	Nov. 8	Nov. 12	Nov. 14
184	Seatrain New York	Nov. 15	Nov. 19	Nov. 21
182	Seatrain Havana	Nov. 22	Nov. 26	Nov. 28
185	Seatrain New York	Nov. 29	Dec. 3	Dec. 5
183	Seatrain Havana	Dec. 6	Dec. 10	Dec. 12
186	Seatrain New York	Dec. 13	Dec. 17	Dec. 19
184	Seatrain Havana	Dec. 20	Dec. 24	Dec. 26
187	Seatrain New York	Dec. 27	Dec. 31	Jan. 2
185	Seatrain Havana	Jan. 3	Jan. 7	Jan. 9
188	Seatrain New York	Jan. 10	Jan. 14	Jan. 16
186	Seatrain Havana	Jan. 17	Jan 21	Jan. 23
189	Seatrain New York	Jan. 24	Jan. 28	Jan. 30
187	Seatrain Havana	Jan. 31	Feb. 4	Feb. 6
190	Seatrain New York	Feb. 7	Feb. 11	Feb. 13
188	Seatrain Havana	Feb. 14	Feb. 18	Feb. 20
191	Seatrain New York	Feb. 21	Feb. 25	Feb. 27
189	Seatrain Havana	Feb. 28	Mar. 3	Mar. 5
192	Seatrain New York	Mar. 6	Mar. 10	Mar. 12
190	Seatrain Havana	Mar. 13	Mar. 17	Mar. 19
193	Seatrain New York	Mar. 20	Mar. 24	Mar. 26

1939—NORTH-BOUND—1940

Voyage No.	Steamer	Lv. New Orleans Every Wednesday	Arr. & Lv. Havana Every Friday	Arr. New York Every Tuesday
181	Seatrain New York	Oct. 11	Oct. 13	Oct. 17
179	Seatrain Havana	Oct. 18	Oct. 20	Oct. 24
182	Seatrain New York	Oct. 25	Oct. 27	Oct. 31
180	Seatrain Havana	Nov. 1	Nov. 3	Nov. 7
183	Seatrain New York	Nov. 8	Nov. 10	Nov. 14
181	Seatrain Havana	Nov. 15	Nov. 17	Nov. 21
184	Seatrain New York	Nov. 22	Nov. 24	Nov. 28
182	Seatrain Havana	Nov. 29	Dec. 1	Dec. 5
185	Seatrain New York	Dec. 6	Dec. 8	Dec. 12
183	Seatrain Havana	Dec. 13	Dec. 15	Dec. 19
186	Seatrain New York	Dec. 20	Dec. 22	Dec. 26
184	Seatrain Havana	Dec. 27	Dec. 29	Jan. 2
187	Seatrain New York	Jan. 3	Jan. 5	Jan. 9
185	Seatrain Havana	Jan. 10	Jan. 12	Jan. 16
188	Seatrain New York	Jan. 17	Jan. 19	Jan. 23
186	Seatrain Havana	Jan. 24	Jan. 26	Jan. 30
189	Seatrain New York	Jan. 31	Feb. 2	Feb. 6
187	Seatrain Havana	Feb. 7	Feb. 9	Feb. 13
190	Seatrain New York	Feb. 14	Feb. 16	Feb. 20
188	Seatrain Havana	Feb. 21	Feb. 23	Feb. 27
191	Seatrain New York	Feb. 28	Mar. 1	Mar. 5
189	Seatrain Havana	Mar. 6	Mar. 8	Mar. 12
192	Seatrain New York	Mar. 13	Mar. 15	Mar. 19
190	Seatrain Havana	Mar. 20	Mar. 22	Mar. 26

FREIGHT STATIONS

*Southwestern Terminal, 111 King Street (Between Greenwich & Hudson Sts.), New York City. LCL received up to 11 A. M. Wed.

5th St. Station, Hoboken Mfrs. R. R., Hoboken, N. J. LCL received up to 1 P. M. Wed.

Texas Pacific–Missouri Pacific Terminal Railroad Freight Station, New Orleans, La. LCL received up to 10 A. M. Wed.

Lighterage deliveries, by special permit, to Seatrain Terminal, rear of Pier 16, Hoboken, N. J.

(See other side for LCL freight schedules.)

182 *Exhibit E*

SEATRAIN LINES, INC.

39 BROADWAY, NEW YORK, N. Y.

Carloads (on break Bulk Service). Less Carloads (Domestic Railroad Packing).

Issued March 15, 1941. Telephone: DIgby 4–8673.

SAILING SCHEDULE

(Subject to change without notice)

1941—*NEW YORK TO TEXAS CITY, TEX.

Voyage No.	Steamer	Lv. New York every Friday	Arrives Texas City every Thursday
20	Seatrain New Jersey	Apr. 4	Apr. 10
	(No sailing this week)		
24	Seatrain Texas	Apr. 18	Apr. 24
21	Seatrain New Jersey	Apr. 25	May 1
25	Seatrain Texas	May 2	May 8
22	Seatrain New Jersey	May 9	May 15
26	Seatrain Texas	May 16	May 22
23	Seatrain New Jersey	May 23	May 29
27	Seatrain Texas	May 30	June 5
24	Seatrain New Jersey	June 6	June 12
28	Seatrain Texas	June 13	June 19
25	Seatrain New Jersey	June 20	June 26
29	Seatrain Texas	June 27	July 3

*Not for Bonded Cargo.

*TEXAS CITY, TEX. TO NEW YORK

Voyage No.	Steamer	Lv. Texas City every Friday	Arrives New York every Thursday
23	Seatrain Texas	Apr. 4	Apr. 10
20	Seatrain New Jersey	Apr. 11	Apr. 17
	(No sailing this week)		
24	Seatrain Texas	Apr. 25	May 1
21	Seatrain New Jersey	May 2	May 8
25	Seatrain Texas	May 9	May 15
22	Seatrain New Jersey	May 16	May 22
26	Seatrain Texas	May 23	May 29
23	Seatrain New Jersey	May 30	June 5
27	Seatrain Texas	June 6	June 12
24	Seatrain New Jersey	June 13	June 19
28	Seatrain Texas	June 20	June 26
25	Seatrain New Jersey	June 27	July 3

NEW YORK—HAVANA—NEW ORLEANS

Voyage No.	Steamer	Lv. New York every Wednesday	Arr. & Lv. Havana every Sunday	Arrives New Orleans every Tuesday
220	Seatrain New York	Apr. 2	Apr. 6	Apr. 8
218	Seatrain Havana	Apr. 9	Apr. 13	Apr. 15
221	Seatrain New York	Apr. 16	Apr. 20	Apr. 22
219	Seatrain Havana	Apr. 23	Apr. 27	Apr. 29
222	Seatrain New York	Apr. 30	May 4	May 6
220	Seatrain Havana	May 7	May 11	May 13
223	Seatrain New York	May 14	May 18	May 20
221	Seatrain Havana	May 21	May 25	May 27
224	Seatrain New York	May 28	June 1	June 3
222	Seatrain Havana	June 4	June 8	June 10
225	Seatrain New York	June 11	June 15	Juen 17
223	Seatrain Havana	June 18	June 22	June 24
226	Seatrain New York	June 25	June 29	July 1

NEW ORLEANS—HAVANA—NEW YORK

Voyage No.	Steamer	Leaves New Orleans	Arr. & Lv. Havana	New York arrive
189	Seatrain New Orleans	Mar. 29	Apr. 1	
217	Seatrain Havana	Apr. 2	Apr. 4	Apr. 8
190	Seatrain New Orleans	Apr. 5	Apr. 8	
220	Seatrain New York	Apr. 9	Apr. 11	Apr. 15
191	Seatrain New Orleans	Apr. 12	Apr. 15	
218	Seatrain Havana	Apr. 16	Apr. 18	Apr. 22
192	Seatrain New Orleans	Apr. 19	Apr. 22	
221	Seatrain New York	Apr. 23	Apr. 25	Apr. 29
193	Seatrain New Orleans	Apr. 26	Apr. 29	
219	Seatrain Havana	Apr. 30	May 2	May 6
194	Seatrain New Orleans	May 3	May 6	
222	Seatrain New York	May 7	May 9	May 13
195	Seatrain New Orleans	May 10	May 13	
220	Seatrain Havana	May 14	May 16	May 20
196	Seatrain New Orleans	May 17	May 20	
223	Seatrain New York	May 21	May 23	May 27
197	Seatrain New Orleans	May 24	May 27	
221	Seatrain Havana	May 28	May 30	June 3
198	Seatrain New Orleans	May 31	June 3	
224	Seatrain New York	June 4	June 6	June 10
199	Seatrain New Orleans	June 7	June 10	
222	Seatrain Havana	June 11	June 13	June 17
200	Seatrain New Orleans	June 14	June 17	
225	Seatrain New York	June 18	June 20	June 24
201	Seatrain New Orleans	June 21	June 24	
223	Seatrain Havana	June 25	June 27	July 1
202	Seatrain New Orleans	June 28	July 1	

*Steamers between New York and Texas City will ordinarily proceed direct, but the right is reserved to make a call at Havana in any case, and in either direction, without further notice.

For List of Freight Stations See Other Side

183 *Exhibit F*

This vessel sailed from New York October 17, 1934. The original manifest was retained by the Collector of the Port of New Orleans.

LIST OF PASSENGERS

(Act Aug. 2, 1882, as Amended by Act Feb. 9, 1905—U. S. C., Title 46, Sec. 158)

I, P. G. Beck, Master of the Seatrain "Havana," do solemnly, sincerely, and truly swear that the following List or Manifest, subscribed by me, and now delivered by me to the Collector of Customs of the Port of New Orleans, La., is a full and perfect list of all the passengers taken on board the said vessel at New York, N. Y., from which port said vessel has now arrived; and that on said list is truly designated the name of each passenger, age (if a child of eight years or under), sex, married or single, location of compartment or space occupied during the voyage (if the passenger be other than a cabin passenger), whether a citizen of the United States, number of pieces of baggage, and the name, age, and cause of death of each deceased passenger. So help me God.

----------, *Collector.*

----------, *Master.*

Subscribed and sworn to before me this ---------- day of ----------, 19----.

No.	Names	Age of child, if 8 years or under		Sex	Married or single	*If passenger, other than cabin passenger, location of compartment or space occupied. (Specify whether forward, amidship, or aft, and what compartment or space and deck.)	Whether citizen of the United States	No. of pieces of baggage	Date and cause of death
		Yrs.	Mths.						
1	John McDevitt.....	30	4	M	M	.....	YES.	2	.....

184 *Exhibit F*

This vessel sailed from New York May 9, 1934. The original manifest was retained by the Collector of the Port of New Orleans.

LIST OF PASSENGERS

(Act Aug. 2, 1882, as Amended by Act Feb. 9, 1905—U. S. C., Title 46, Sec. 158)

I, A. A. Dalzell, Master of the Seatrain "New York," do solemnly, sincerely, and truly swear that the following List or Manifest, subscribed by me, and now delivered by me to the Collector of Customs of the Port of New Orleans, La., is a full and perfect list of all the passengers taken on board the said vessel at New York, N. Y., from which port said vessel has now arrived; and that on said list is truly designated the name of each passenger, age (if a child of eight years or under), sex, married or single, location of compartment or space occupied during the voyage (if the passenger be other than a cabin passenger), whether a citizen of the United States, number of pieces of baggage, and the name, age, and cause of death of each deceased passenger. So help me God.

----------, *Master.*

Subscribed and sworn to before me this---------- day of----------, 19-----.

----------, *Collector.*

No.	Names	Age of child, if 8 years or under		Sex	Married or single	*If passenger, other than cabin passenger, location of compartment or space occupied. (Specify whether forward, amidship, or aft, and what compartment of space and deck.)	Whether citizen of the United States	No. of pieces of baggage	Date and cause of death
		Yrs.	Mths.						
1	Frederick Bradley	46	9	M	M	----------	YES	4	-------

194 Docket No. W 543. Filed May 29, 1941. Interstate Commerce Commission.

APPLICATION FOR ☒ CERTIFICATE AS COMMON CARRIER BY WATER ☐ PERMIT AS CONTRACT CARRIER BY WATER SUBJECT TO THE INTERSTATE COMMERCE ACT

(Before answering, read general instructions attached hereto)

BEFORE THE INTERSTATE COMMERCE COMMISSION

Application of Seatrain Lines, Inc., a Delaware Corporation, 39 Broadway, New York, New York,

Application below is for the appropriate authority to: (check applicable status):

☐ to continue an operation in existence January 1, 1940, and continuously thereafter
☒ to continue an operation not existing January 1, 1940, but existing February 1, 1941

as a ☒ common carrier ☐ contract carrier

of ☐ passengers ☒ property

by water in interstate or foreign commerce (as defined in section 302 (i)).

Application for certificate as common carrier of property covers ☒ all commodities permitted by law ☐ commodities with exceptions as detailed in Exhibits "A" or "B."

Application for a contract carrier permit of property covers ☐ all commodities with exceptions as detailed in Exhibits "A" or "B" ☐ specific commodities as detailed in Exhibits "A" or "B."

Application covers ☒ regular routes ☐ irregular routes.

Operation is ☒ year around ☐ seasonal between _____ (month) and _____ (month)

In support of this application, applicant submits the following exhibit attached hereto and made a part hereof: ☐ Exhibit "A" ☒ Exhibit "B" (See General Instructions).

Applicant will furnish such additional information to substantiate the applicant's prayer as the Commission may require.

Applicant has complied with the order of the Commission relative to the service on interested parties, as shown below.

Applicant reserves the right to claim exemption from any and all provisions of Part III of the Interstate Commerce Act, the filing of this application not being deemed a waiver thereof, and the operations, if any, which applicant believes to be exempt are those described below:

(If exemption is claimed in respect of any operations applicant should here describe such operations, and in each instance make reference to the statutory provision or provisions under which the exemption is claimed.)

Wherefore, The applicant herein prays: That the Commission issue a Certificate to operate as a Common Carrier of Property generally, and applicant further prays that if the facts herein

contained show that applicant, although applying for a Certificate, is entitled to a Permit, this application be considered one for the appropriate form of authority.

Dated this 28th day of May 1941.

SEATRAIN LINES, INC.
By C. K. MORSE, *Vice-President.*

196 OATH

STATE OF NEW YORK,
County of New York, ss:

E. K. Morse makes oath and says that he is the Vice President of Seatrain Lines, Inc.; that he is authorized on the part of said applicant to verify and file with the Interstate Commerce Commission this application and exhibits attached hereto and made a part hereof; that he has carefully examined all of the statements contained in such application and the exhibits attached thereto and made a part thereof; that he has knowledge of the matter set forth therein, and that all such statements made and matters set forth therein are true and correct to the best of his knowledge, information, and belief.

C. K. MORSE.

Subscribed and sworn to before me, a Notary Public in and for the State and county above named, this 28th day of May 1941.

(SEAL) BLANCHE C. WELCH,
Notary Public.

New York County Clerk's No. 103; New York County Register's No. 3 W 5.

Term Expires March 30, 1943.

CERTIFICATE OF SERVICE

A copy of this application has been served by receipted mail on the Governors of the following States: New Jersey, New York, Texas.

A notice of the filing of this application (Form B. W. C. 5) has been served by receipted mail on the following known water-line competitors: Pan-Atlantic Steamship Corporation; Southern Steamship Company; Southern Pacific Company (Southern Pacific Steamship Lines "Morgan Line"); The Bull Steamship Line.

Postal receipts or certificates of mailing covering the above are attached hereto.

Date May 28th, 1941.

(Signed) C. K. MORSE.

197 *Exhibit "A"*

(This exhibit to be filled out by applicants for common carrier certificates or contract carrier permits claiming status under the provisos of section 309 (a) or 309 (f) of the Interstate Commerce Act.)

(Name of applicant)

Except as otherwise noted, the following information is to be as of January 1, 1940. The information given should, where necessary, cover a sufficient period prior to such date to give a clear and fair picture of the nature and extent of the business of applicant which properly should be covered by the certificate or permit sought. Wherever changes in the nature or extent of the operation have been made since January 1, 1940, they should be clearly indicated.

DESCRIPTION OF TRANSPORTATION SERVICE, ROUTES, PORTS SERVED REGULARLY AND IRREGULARLY, AND OTHER PERTINENT INFORMATION

I. Description of transportation service:

A. Applicant (or predecessor in interest) was engaged in the business of transporting, in interstate or foreign commerce: (1) ☐ Commodities generally. (2) ☐ Commodities generally, except_____

(Indicate exceptions, either specifically or by their general nature)

(3) ☐ Special commodities_____

(Indicate specifically commodities transported)

(4) ☐ Passengers.

B. Applicant (or predecessor in interest) undertook to transport passengers or property for the general public for hire. _____

(Yes or No)

If answer is "No", state for whom applicant (or predecessor in interest) transported since January 1, 1940, or prior thereto, under special contracts or agreements:

Name	*Address (Street, City and State)*	*Written or Verbal Contract or Agreement and Date Thereof*
(1)		
(2)		
(2)		
(3)		
(4)		
(5)		
(6)		

Commodity Covered	Volume Agreed to be Transported	Duration of Contract or Agreement
(1a)		
(2a)		
(3a)		
(3a)		
(4a)		
(5a)		
(6a)		

(NOTE: Lines (1a), (2a), (3a), etc., are a continuation respectively of the same contract referred to on lines (1), (2), (3), etc.)

C. Applicant (or predecessor in interest) has continued to operate as above stated without any change in the transportation service as described above and is now so operating _____ (Yes or No) If answer is "No", state in detail character and extent of such change in service_____

D. If the changes indicated in the answer to (C) above represent interruptions of transportation service since January 1, 1940, caused by conditions over which applicant (or predecessor in interest) had no control, give facts and reasons clearly and in detail_____

E. Applicant (or predecessor in interest) is engaged in furnishing seasonal transportation only. _____ (Yes or No) If the answer is "Yes", state the limits of the seasonal operation, naming month of commencement and month of cessation_____

If the above seasonal period does not include January 1, 1940, was applicant (or predecessor in interest) rendering above service during the seasonal period ending prior to that date? _____ (Yes or No)

Was applicant (or predecessor in interest) providing same service during seasonal period subsequent to January 1, 1940? _____ (Yes or No)

Outline fully any changes in character and extent of service between seasonal operation including, or prior to, January 1, 1940, and subsequent seasonal operation:_____

II. Description of Routes:

A. Regular Routes: Ports or points to or from which applicant (or predecessor in interest) regularly operated as of January 1, 1940, or prior thereto, and number of revenue calls at each between January 1, 1940, and date of application:

B. Irregular Routes: Ports or points to or from which applicant (or predecessor in interest) offered occasional but irregular service as of January 1, 1940, or prior thereto, and number of revenue calls at each between January 1, 1940, and date of application:

C. Has applicant (or predecessor in interest) acquired by purchase or otherwise a route or routes since January 1, 1940? ------ (Yes or No)
If so, attach statement, properly designated, giving, for each such route, the information requested in A and B above, also name and address of predecessor. Attach copy of purchase agreement, or other documents, evidencing the acquisition of each such route or routes.

D. Does applicant apply for rights over any route or routes operated by others under agreement? ------ (Yes or No) If so, attach statement, properly designated, giving, for each route, the information requested in A and B above, also name and address of operator. Attach copy of charter, operating contract, or other agreement.

E. Does applicant apply for rights over any route or routes over which it operates ships owned by others under charter, contract, or other agreement? ------ (Yes or No) If so, attach statement, properly designated, giving, for each such route, the information requested

in A and B above, also name and address of the other party to such charter, contract, or agreement. Attach copy of such charter, contract, or agreement.

F. Has applicant (or predecessor in interest) abandoned or disposed of by sale or otherwise any route or routes since January 1, 1940? ------ (Yes or No) If so, attach statement, properly designated, giving, for each such route, the information requested in A and B above, the manner and date of disposition, and name and address of successor, if any. Attach copy of the sales agreement or other documents evidencing such disposal.

G. Were operations on any of the above routes or parts of such routes covered by answer to questions C, D, E, or F seasonal? ------ (Yes or No) If so, attach statement, properly designated, giving facts clearly and in detail, showing applicant's customary operation (or that of predecessor in interest), including months of normal operating season.

H. If applicant (or predecessor in interest) is subject to Part III of the Interstate Commerce Act in transportation of passengers or property in interstate or foreign commerce only by reason of participation in through routes and joint rates, name carriers with whom such traffic was interchanged as of January 1, 1940, or prior thereto, and interchange points: ----------

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State clearly any changes since January 1, 1940:

III. Description of Equipment:

A. Total number of vessels in commission and operated by applicant (or predecessor in interest) as a common or contract carrier on January 1, 1940, including vessels owned, chartered, or leased from others----------

(1) Number of owned vessels operated by applicant (or predecessor in interest)----------

(2) Number of vessels under charter to applicant (or predecessor in interest)----------

(Answers to (1) and (2) should total answer to (A))

B. Number of vessels owned by applicant (or predecessor in interest) and under charter to others on January 1, 1940----------

---

C. Total number of vessels in commission and operated by applicant (or predecessor in interest) as a common or contract carrier on date of this application, including vessels owned, chartered, or leased from others _____

(1) Number of owned vessels operated by applicant or predecessor in interest) _____

(2) Number of owned vessels operated by applicant (or predecessor in interest) _____

(Answers to (1) and (2) should total answer to (C))

D. Number of vessels owned by applicant (or predecessor in interest) and under charter to other on date of this application _____

IV. Dual Operations:

A. Is applicant (or predecessor in interest) controlled by a person who has filed or intends to file a separate application for a certificate as a common carrier by water or a permit as a contract carrier by water? _____ (Yes or No) If answer is "Yes", state name and address of such person, and whether such person is applying for a common carrier certificate or contract carrier permit _____

Was applicant (or predecessor in interest) so controlled on January 1, 1940? _____ (Yes or No)

B. Does applicant (or predecessor in interest) control a person who has filed or intends to file a separate application for a certificate as a common carrier by water or a permit as a contract
201 carrier by water? _____ (Yes or No) If answer is "Yes", state name and address of such person, and whether such person is applying for a common carrier certicate or contract carrier permit _____

Did applicant (or predecessor in interest) control such person on January 1, 1940? _____ (Yes or No)

C. Is applicant (or predecessor in interest) under common control with a person who has filed or intends to file a separate application for a certificate as a common carrier by water or a permit as a contract carrier by water? _____ (Yes or No) If answer is "Yes", state name and address of such person, and whether such person is applying for a common carrier certificate or contract carrier permit.

_____

Was applicant (or predecessor in interest) under such common control on January 1, 1940? ------
(Yes or No)

U. Evidence of Operation:

A. Applicant submits the following evidence as proof of its operations (or those of predecessor in interest) as of January 1, 1940:

(Applicant should list above the documents it is attaching in the form of affidavits, bills of lading, schedules, or other documents which it believes sufficiently prove the maintenance of service as stated.)

B. Applicant submits the following evidence as proof of its operations (or those of predecessor in interest) on the date of this application:

(Applicant should list above the documents it is attaching in the form of affidavits, bills of lading, schedules, or other documents which it believes sufficiently prove the maintenance of service as stated.)

202 Form B. W. C. 2.

Exhibit "B"

(This exhibit to be filled out by applicants for common carrier certificates or contract carrier permits who were in operation on February 1, 1941, but not claiming status under the provisos of section 309 (a) or 309 (f) of the Interstate Commerce Act.)

(Name of Applicant), Seatrain Lines, Inc.

Except as otherwise noted, the following information is to be as of the date of filing application. The information given should, where necessary, cover a sufficient period prior to such date to give a clear and fair picture of the nature and extent of the business of applicant which properly should be covered by the certificate or permit sought.

DESCRIPTION OF TRANSPORTATION SERVICE, ROUTES, PORTS SERVED REGULARLY AND IRREGULARLY, AND OTHER PERTINENT INFORMATION

I. Description of Transportation Service:

A. Applicant is engaged in the business of transporting, in interstate or foreign commerce: (1) ☒ Commodities generally. (2) ☐ Commodities generally, except----------
(Indicate exceptions,
either specifically or by their general nature)
(3) ☐ Special commodities----------
(Indicate specifically
commodities transported)
(4) ☐ Passengers.

B. Applicant undertakes to transport passengers or property for the general public for hire. Yes. If answer is "No," state (Yes or No)
for whom applicant has transported under special contracts or agreements:

Name	Address (Street, City, and State)	Written or Verbal Contracts or Agreement and Date Thereof
(1)		
(2)		
(3)		
(4)		
(5)		
(6)		

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Commodity covered	Volume agreed to be transported	Duration of contract or agreement
(1a)		
(2a)		
(3a)		
(4a)		
(5a)		
(6a)		

(NOTE—Lines (1a), (2a), (3a), etc. are a continuation respectively of same contract referred to in line (1), (2), (3), etc.).

C. Applicant is engaged in furnishing seasonal transportation only. No. If the answer is "Yes", state the limits of the seasonal
(Yes or No)
operation naming month of commencement and month of cessation.

If the above seasonal period does not include February 1, 1941, was applicant rendering above service during the seasonal period ending prior to that date?_____
(Yes or No)

D. If applicant was not engaged in furnishing seasonal transportation, name date operation commenced. May 24, 1940.

II. Description of Routes:

A. Regular Routes: Ports or points to or from which applicant was regularly operating as of February 1, 1941, or prior thereto, and number of revenue calls at each between date operation commenced and date of application: A regular weekly service in each direction between the Port of New York and the Port of Texas City, direct or via Havana, Cuba; 48 revenue calls at New York; 48 revenue calls at Texas City, between dates mentioned.

B. Irregular Routes: Ports or points to or from which applicant offered occasional but irregular service as of February 1, 1941.

or prior thereto, and number of revenue calls at each between date operation commenced and date of application:

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C. If applicant is subject to Part III of the Interstate Commerce Act in transportation of passengers or property in interstate or foreign commerce only by reason of participation in through routes and joint rates, name carriers with whom such traffic is interchanged and interchange points: Not applicable.

III. Description of Equipment:

A. Total number of vessels in commission and operated by applicant as a common or contract carrier on February 1, 1941, including vessels owned, chartered, or leased from others. 5. (1) Number of owned vessels operated by applicant. 5. (2) Number of vessels under charter to applicant. 0. (Answers to (1) and (2) should total answer to (A)).

B. Number of vessels owned by applicant and under charter to others on February 1, 1941. 0.

C. Total number of vessels in commission and operated by applicant as a common or contract carrier on date of this application, including vessels owned, chartered, or leased from others. 5. (1) Number of owned vesels operated by applicant. 5. (2) Number of vessels under charter to applicant. 0. (Answers to (1) and (2) should total answer to (C)).

D. Number of vessels owned by applicant and under charter to others on date of this application. 0.

205 Dual Operations:

A. Is applicant controlled by a person who has filed or intends to file a separate application for a certificate as a common carrier by water or a permit as a contract carrier by water? No. If answer is "Yes", state name and address of such person, and whether such person is applying for a common carrier certificate or contract carrier permit.

B. Does applicant control a person who has filed or intends to file a separate application for a certificate as a common carrier by water or a permit as a contract carrier by water? No. If answer is "Yes", state name and address of such person, and

whether such person is applying for a common carrier certificate or a contract carrier permit.

C. Is applicant under common control with a person who has filed or intends to file a separate application for a certificate as a common carrier by water or a permit as a contract carrier by water? No. If answer is "Yes", state name and address of such person, and whether such person is applying for a common carrier certificate or contract carrier permit.

V: Evidence of Operation:

A. Applicant submits the following evidence as proof of its operations as of February 1, 1941: Affidavit of Vice President of Seatrain Lines, Inc. (See Exhibit C). Sailing list of Seatrain Lines, Inc., as of February 1, 1941 (See Exhibit D).

(Applicant should list above the documents it is attaching in the form of affidavits, bills of lading, schedules, or other documents, which it believes sufficiently prove the maintenance of service as stated.)

B. Applicant submits the following evidence as proof of its operations on the date of this application: Affidavit of Vice President of Seatrain Lines, Inc. (See Exhibit C). Sailing list of Seatrain Lines, Inc., as of the date of this application (See Exhibit E).

206 (Applicant should list above the documents it is attaching in the form of affidavits, bills of lading, schedules, or other documents, which it believes sufficiently prove the maintenance of service as stated.)

VI: Evidence of Qualifications:

A. Applicant for common carrier certificate submits the following evidence as proof that it is fit, willing, and able properly to perform the service proposed, and to conform to the provisions of Part III of the Interstate Commerce Act, and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent authority is sought, is or will be required by the present or future public convenience and necessity.

(Applicant should list the documents it is attaching hereto which it believes sufficiently prove that the operation for which the common carrier certificate is sought will meet the above requirements. The documents must include the following:

(1) A statement of assets and liabilities, or if a newly organized

corporation a statement of proposed capitalization and method of financing.

(2) If applicant has been in operation an income statement and profit and loss statement for the period of its operation; in the event the operation is such as to come under the Interstate Commerce Act, as amended, only in part, give a segregated profit and loss statement for such operation coming within the provisions of the Act, indicating the method of segregation.

(3) A statement containing brief description of the experience of the principal officers and operating personnel.

(4) An estimate of the available traffic and applicant's expected handling by classes of commodities or by number of passengers, and the prospective revenue and income from all traffic which applicant expects to handle.

(5) A statement of whether applicant's operation will be for the benefit of particular industries.

(6) A list of the known water carrier competitors now giving service between the ports which applicant proposes to serve.

See Exhibit F for (1) above; Exhibit G (1, 2 & 3) for (2) above; Exhibit H for (3) above; Exhibit I for (4) above; Exhibit J for (5) above. (6) There are no known water carrier competitors now giving service between these ports.

207 B. Applicant for contract carrier permit submits the following evidence as proof that it is fit, willing, and able properly to perform the service proposed and to conform to the provisions of Part III of the Interstate Commerce Act, and the requirements, rules, and regulations of the Commission thereunder, and that such operation will be consistent with the public interest and the national transportation policy declared in the act.

(Applicant should list the documents it is attaching hereto which it believes sufficiently prove that the operation for which the contract carrier permit is sought will meet the above requirements. The documents must include the following:)

(1) A statement of assets and liabilities, or if a newly organized corporation a statement of proposed capitalization and method of financing.

(2) If applicant has been in operation an income statement and profit and loss statement for the period of its operation; in the event the operation is such as to come under the Interstate Commerce Act, as amended, only in part, give a segregated profit and loss statement for such operatic coming within the provisions of the Act, indicating the method o1 segregation.

(3) A statement containing brief description of the experience of the principal officers and operating personnel.

(4) An estimate of the available traffic and applicant's expected handling by classes of commodities or by number of passengers, and the prospective revenue and income from all traffic which applicant expects to handle.

(5) A statement of whether applicant's operation will be for the benefit of particular industries.

(6) A list of the known water carrier competitors now giving service between the ports which applicant proposes to serve.

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208 Form B. W. C. 2.

GENERAL INSTRUCTIONS

Application should be carefully and completely filled out by typewriter, each copy of the application being an original and not a carbon copy. In the event that applicant finds it more convenient to print or duplicate by mimeograph, multigraph, planograph, or photograph, the entire application must exactly follow the prescribed form in all respects. Answers to questions must be double-spaced, leaving a left-hand margin of not less than 1½ inches. All statements or additional exhibits attached to the application must conform as nearly as possible to the size of the prescribed application form and must be on paper weighing not less than 16 pounds to the ream, with left-hand margin not less than 1½ inches wide. Each statement or additional exhibit attached must be clearly identified and must be double-spaced, if typewritten. If applicant elects to print application and answers the printing must be in 10- or 12-point type on good unglazed paper.

If space provided in the blank form is not sufficient, the answer should be prepared on a separate sheet of paper and attached as Exhibit "C" (or "D," "E," etc.) In the blank space reference to the exhibit should be made by stating: "See Exhibit 'C'," etc.

Additional copies of the appropriate application form and of Form B. W. C. 5 may be obtained if needed by applicants from the Bureau of Water Carriers, Interstate Commerce Commission, Washington, D. C.

The application form is for use of both applicants for common carrier certificates or for contract carrier permits. The application form also provides for an alternative prayer that in the event

the facts contained in the application and accompanying exhibits show that the applicant, although applying for a _____ (Certificate) _____ is entitled to a _____, the application (Permit) (Permit) (Certificate) is to be considered one for the appropriate form of authority.

This application should be filed as a protective measure even though exemption from the Act is claimed. The filing of the application and accompanying exhibits will not be deemed a waiver of any rights of applicant to such exemption.

The application form provides for the submission of two alternative exhibits, viz., Exhibit "A" and Exhibit "B." Exhibit "A" is to be filled out by applicants for common carrier certificates or contract carrier permits claiming status under the provisos of section 309 (a) or 309 (f), respectively, as quoted below:

As to common carriers by water:

SEC. 309 (a) * * * Provided, however, That subject to section 310, if any such carrier or a predecessor in interest was in bona fide operation as a common carrier by water on January 1, 1940, over the route or routes or between the ports with respect to which application is made and has so operated since that time (or, if engaged in furnishing seasonal service only, was in bona
209 fide operation during the seasonal period, prior to or including such date, for operations of the character in question) except, in either event, as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission as provided in subsection (b) of this section and prior to the expiration of one hundred and twenty days after this section takes effect. Pending the determination of any such application, the continuance of such operation shall be lawful. If the application for such certificate is not made within one hundred and twenty days after this section takes effect, it shall be decided in accordance with the standards and procedure provided for in subsection (c), and such certificate shall be issued or denied accordingly.

As to contract carriers by water:

SEC. 309 (f) * * * Provided, That, subject to section 310, if any such carrier or a predecessor in interest was in bona fide operation as a contract carrier by water on January 1, 1940, over the route or routes or between the ports with respect to which application is made, and has so operated since that time (or, if

engaged in furnishing seasonal service only, was in bona fide operation during the seasonal period, prior to or including such date, for operations of the character in question) except, in either event, as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such permit, without further proceedings, if application for such permit is made to the Commission as provided in subsection (g) of this section and prior to the expiration of one hundred and twenty days after this section takes effect. Pending the determination of any such application, the continuance of such operation shall be lawful. If the application for such permit is not made within one hundred and twenty days after this section takes effect, it shall be decided in accordance with the standards and procedure provided for in the subsection (g), and such permit shall be issued or denied accordingly.

Applicants for common carrier certificates or contract carrier permits who do not claim status under the above provisos, but who were in operation on February 1, 1941, should fill out Exhibit "B" and attach to the application.

Applicant must serve by receipted mail a copy of the application on the Governor of each State in which is located a port or point served, and must notify by mailing a filled-out notice (Form B. W. C. 5) by receipted mail to each known water-line competitor in the same trade route or routes. Applicant should also in the proper space in his application list the parties on whom such copies of application have been served and the parties on whom such notices have been served. Applicant should obtain receipts from the Post Office for the notices of mailing under the following Post Office regulation:

Upon request and payment of 1 cent for each piece of ordinary mail of any class, the sender will be furnished a receipt
210 or Certificate of Mailing. This fee carries with it no insurance or indemnity and no return receipt is obtained from the addressee.

These receipts or certificates of mailing must be attached to the original application filed with the Commission.

The original of this application, properly signed and sworn to before a notary public, and two additional copies must be returned to: The Interstate Commerce Commission, Bureau of Water Carriers, Washington, D. C.

After the filing of the application, the applicant will be notified by the Commission of all subsequent proceedings.

211 *Exhibit C*

STATE OF NEW YORK,
County of New York, ss

E. K. Morse, being duly sworn, deposes and says as follows:

I am an officer of applicant, Seatrain Lines, Inc., being Vice-President thereof, and for many years I have been and am now connected with and thoroughly familiar with the business and operations of said company.

Since May 24, 1940 and continuously thereafter, including on or about February 1, 1941 and without interruption since that time, applicant has operated a transportation service on regular schedules as a common carrier by water between the port of New York and the port of Texas City, Texas, at times via Havana, Cuba, applicant's terminal at the port of New York being at Hoboken, New Jersey. Originally the service was fortnightly, and since July 5, 1940, it has been weekly.

In the operation of this weekly service, applicant has been engaged as a common carrier by water in the transportation of freight generally in interstate commerce between the port of New York and the port of Texas City, Texas, and in connection with common carriers by rail has also been engaged in the transportation of freight over through routes by rail and water, water and rail, and rail, water and rail between points in Eastern Trunk Line, New England, and Central Freight Association territories, including New York Harbor, on the one hand, and points in the Southwest, including Texas City, Texas, on the other hand.

For such transportation applicant has published and maintained, as required by law, tariff schedules naming a full line of class and commodity rates applicable to the transportation described and by such tariff schedules has held itself out to the general public as a common carrier by water to accept and transport freight of all kinds in accordance with the rules, regu-
212 lations and rates provided in said tariffs, subject to the legal rights, obligations, and limitations governing transportation by common carriers by water. As proof thereof, reference is made to the following tariff schedules, among others, published and filed with this Commission by or on behalf of applicant, in which are named rates, rules, and regulations for the transportation of freight of all kinds via its line:

Seatrain Lines, Inc., I. C. C. Nos. 28 and 38.
Agent J. R. Peel's, I. C. C. Nos. 3296 and 3367.
Denver & Rio Grande Western R. R. I. C. C. No. 700.
New Orleans, Texas & Mexico Ry. I. C. C. No. A-1218.

As further proof that applicant was engaged on or about February 1, 1941, in operation as a common carrier for the purposes of

the transportation described and is so engaged at the present time, reference is made to sailing schedules attached hereto and made a part hereof, showing published sailings of applicant's vessels, which were actually performed in accordance therewith. (See Exhibits D and E.)

As further proof that applicant was engaged in operation as a common carrier by water between the ports and over the routes described on February 1, 1941, and has been so engaged continuously since that time, reference is made to the findings of the Interstate Commerce Commission and to the evidence before the Commission in proceeding entitled Application of The Missouri Pacific Railroad Company and Texas & Pacific Railway Company under Section 5 (19–21) of Interstate Commerce Act, Docket No. 25546, decided April 8, 1941.

E. K. MORSE.

Subscribed in my presence and sworn to before me by the affiant above named this 28th day of May 1941.

BLANCHE C. WELCH.
Notary Public.

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Exhibit D

SEATRAIN LINES, INC.

39 BROADWAY, NEW YORK, N. Y.

Carloads (on break Bulk Service). Less Carloads (Domestic Railroad Packing).

Issued Dec. 26, 1940. Telephone DIgby 4–8673.

SAILING SCHEDULE

(Subject to change without notice)

1941—NEW YORK TO TEXAS CITY, TEX.

Voyage No.	Steamer	Lv. New York Every Friday	Arrives Texas City Every Thursday
12	Seatrain Texas	Jan. 3	Jan. 9
14	Seatrain New Jersey	Jan. 10	Jan. 15
15	Seatrain Texas	Jan. 17	Jan. 23
17	Seatrain New Jersey	Jan. 24	Jan. 30
19	Seatrain Texas	Jan. 31	Feb. 6
16	Seatrain New Jersey	Feb. 7	Feb. 13
20	Seatrain Texas	Feb. 14	Feb. 20
17	Seatrain New Jersey	Feb. 21	Feb. 27
21	Seatrain Texas	Feb. 28	Mar. 6
18	Seatrain New Jersey	Mar. 7	Mar. 13
22	Seatrain Texas	Mar. 14	Mar. 20
19	Seatrain New Jersey	Mar. 21	Mar. 27
23	Seatrain Texas	Mar. 28	Apr. 3

*TEXAS CITY, TEX. TO NEW YORK

Voyage No.	Steamer	Lv. Texas City Every Friday	Arrives New York Every Thursday
13	Seatrain New Jersey	Jan. 3	Jan. 9
17	Seatrain Texas	Jan. 10	Jan. 16
14	Seatrain New Jersey	Jan. 17	Jan. 23
18	Seatrain Texas	Jan. 24	Jan. 30
15	Seatrain New Jersey	Jan. 31	Feb. 6
19	Seatrain Texas	Feb. 7	Feb. 13
16	Seatrain New Jersey	Feb. 14	Feb. 20
20	Seatrain Texas	Feb. 21	Feb. 27
17	Seatrain New Jersey	Feb. 28	Mar. 6
21	Seatrain Texas	Mar. 7	Mar. 13
18	Seatrain New Jersey	Mar. 14	Mar. 20
22	Seatrain Texas	Mar. 21	Mar. 27
19	Seatrain New Jersey	Mar. 28	Apr. 3

NEW YORK—HAVANA—NEW ORLEANS

Voyage No.	Steamer	Lv. New York Every Wednesday	Arr. & Lv. Havana Every Sunday	Arrives New Orleans Every Tuesday
211	Seatrain Havana	Jan. 1	Jan. 5	Jan. 7
214	Seatrain New York	Jan. 8	Jan. 12	Jan. 14
212	Seatrain Havana	Jan. 15	Jan. 19	Jan. 21
215	Seatrain New York	Jan. 22	Jan. 26	Jan. 28
213	Seatrain Havana	Jan. 29	Feb. 2	Feb. 4
216	Seatrain New York	Feb. 5	Feb. 9	Feb. 11
214	Seatrain Havana	Feb. 12	Feb. 16	Feb. 18
217	Seatrain New York	Feb. 19	Feb. 23	Feb. 25
215	Seatrain Havana	Feb. 26	Mar. 2	Mar. 4
218	Seatrain New York	Mar. 5	Mar. 9	Mar. 11
216	Seatrain Havana	Mar. 12	Mar. 16	Mar. 18
219	Seatrain New York	Mar. 19	Mar. 23	Mar. 25
217	Seatrain Havana	Mar. 26	Mar. 30	Apr. 1

NEW ORLEANS—HAVANA—NEW YORK

Voyage No.	Steamer	Leaves New Orleans	Arr. & Lv. Havana	Arrives New York
213	Seatrain New York	Jan. 1	Jan. 3	Jan. 7
177	Seatrain New Orleans	Jan. 3	Jan. 6	
211	Seatrain Havana	Jan. 8	Jan. 10	Jan. 14
178	Seatrain New Orleans	Jan. 11	Jan. 14	
214	Seatrain New York	Jan. 15	Jan. 17	Jan. 21
179	Seatrain New Orleans	Jan. 18	Jan. 21	
212	Seatrain Havana	Jan. 22	Jan. 24	Jan. 28
180	Seatrain New Orleans	Jan. 25	Jan. 28	
215	Seatrain New York	Jan. 29	Jan. 31	Feb. 4
181	Seatrain New Orleans	Feb. 1	Feb. 4	
213	Seatrain Havana	Feb. 5	Feb. 7	Feb. 11
182	Seatrain New Orleans	Feb. 8	Feb. 11	
216	Seatrain New York	Feb. 12	Feb. 14	Feb. 18
183	Seatrain New Orleans	Feb. 15	Feb. 18	
214	Seatrain Havana	Feb. 19	Feb. 21	Feb. 25
284	Seatrain New Orleans	Feb. 22	Feb. 25	
217	Seatrain New York	Feb. 26	Feb. 28	Mar. 4
185	Seatrain New Orleans	Mar. 1	Mar. 4	
215	Seatrain Havana	Mar. 5	Mar. 7	Mar. 11
186	Seatrain New Orleans	Mar. 8	Mar. 11	
218	Seatrain New York	Mar. 12	Mar. 14	Mar. 18
187	Seatrain New Orleans	Mar. 15	Mar. 18	
216	Seatrain Havana	Mar. 19	Mar. 21	Mar. 25
188	Seatrain New Orleans	Mar. 22	Mar. 25	
219	Seatrain New York	Mar. 26	Mar. 28	Apr. 1

*Steamers between New York and Texas City will ordinarily proceed direct, but the right is reserved to make a call at Havana in any case, and in either direction, without further notice.

For List of Freight Stations See Other Side

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Exhibit E

SEATRAIN LINES, INC.

39 BROADWAY, NEW YORK, N. Y.

Carloads (on break Bulk Service). Less Carloads (Domestic Railroad Packing).

Issued March 15, 1941. Telephone: DJgby 4-8673.

SAILING SCHEDULE

(Subject to change without notice)

1941— • NEW YORK TO TEXAS CITY, TEX.

Voyage No.	Steamer	Lv. New York Every Friday	Arrives Texas City Every Thursday
20	Seatrain New Jersey	Apr. 4	Apr. 10
—	(No Sailing This Week)		
24	Seatrain Texas	Apr. 18	Apr. 24
21	Seatrain New Jersey	Apr. 25	May 1
25	Seatrain Texas	May 2	May 8
22	Seatrain New Jersey	May 9	May 15
26	Seatrain Texas	May 16	May 22
23	Seatrain New Jersey	May 23	May 29
27	Seatrain Texas	May 30	June 5
24	Seatrain New Jersey	June 6	June 12
28	Seatrain Texas	June 13	June 19
25	Seatrain New Jersey	June 20	June 26
29	Seatrain Texas	June 27	July 3

• TEXAS CITY, TEX. TO NEW YORK

Voyage No.	Steamer	Lv. Texas City Every Friday	Arrives New York Every Thursday
23	Seatrain Texas	Apr. 4	Apr. 10
20	Seatrain New Jersey	Apr. 11	Apr. 17
—	(No Sailing This Week)		
24	Seatrain Texas	Apr. 25	May 1
21	Seatrain New Jersey	May 2	May 8
25	Seatrain Texas	May 9	May 15
22	Seatrain New Jersey	May 16	May 22
26	Seatrain Texas	May 23	May 29
23	Seatrain New Jersey	May 30	June 5
27	Seatrain Texas	June 6	June 12
24	Seatrain New Jersey	June 13	June 19
28	Seatrain Texas	June 20	June 26
25	Seatrain New Jersey	June 27	July 3

NEW YORK—HAVANA—NEW ORLEANS

Voyage No.	Steamer	Lv. New York Every Wednesday	Arr. & Lv. Havana Every Sunday	Arrives New Orleans Every Tuesday
220	Seatrain New York	Apr. 2	Apr. 6	Apr. 8
218	Seatrain Havana	Apr. 9	Apr. 13	Apr. 15
221	Seatrain New York	Apr. 16	Apr. 20	Apr. 22
219	Seatrain Havana	Apr. 23	Apr. 27	Apr. 29
222	Seatrain New York	Apr. 30	May 4	May 6
220	Seatrain Havana	May 7	May 11	May 13
223	Seatrain New York	May 14	May 18	May 20
221	Seatrain Havana	May 21	May 25	May 27
224	Seatrain New York	May 28	June 1	June 3
222	Seatrain Havana	June 4	June 8	June 10
225	Seatrain New York	June 11	June 15	June 17
223	Seatrain Havana	June 18	June 22	June 24
226	Seatrain New York	June 25	June 29	July 1

NEW ORLEANS—HAVANA—NEW YORK

Voyage No.	Steamer	Leaves New Orleans	Arr. & Lv. Havana	New York Arrive
189	Seatrain New Orleans	Mar. 29	Apr. 1	
217	Seatrain Havana	Apr. 2	Apr. 4	Apr. 8
190	Seatrain New Orleans	Apr. 5	Apr. 8	
220	Seatrain New York	Apr. 9	Apr. 11	Apr. 15
191	Seatrain New Orleans	Apr. 12	Apr. 15	
218	Seatrain Havana	Apr. 16	Apr. 18	Apr. 22
192	Seatrain New Orleans	Apr. 19	Apr. 22	
221	Seatrain New York	Apr. 23	Apr. 25	Apr. 29
193	Seatrain New Orleans	Apr. 26	Apr. 29	
219	Seatrain Havana	Apr. 30	May 2	May 6
194	Seatrain New Orleans	May 3	May 6	
222	Seatrain New York	May 7	May 9	May 13
195	Seatrain New Orleans	May 10	May 13	
220	Seatrain Havana	May 14	May 16	May 20
196	Seatrain New Orleans	May 17	May 20	
223	Seatrain New York	May 21	May 23	May 27
197	Seatrain New Orleans	May 24	May 27	
221	Seatrain Havana	May 28	May 30	June 3
198	Seatrain New Orleans	May 31	June 3	
224	Seatrain New York	June 4	June 6	June 10
199	Seatrain New Orleans	June 7	June 10	
222	Seatrain Havana	June 11	June 13	June 17
200	Seatrain New Orleans	June 14	June 17	
225	Seatrain New York	June 18	June 20	June 24
201	Seatrain New Orleans	June 21	June 24	
223	Seatrain Havana	June 25	June 27	July 1
202	Seatrain New Orleans	June 28	July 1	

• Steamers between New York and Texas City will ordinarily proceed direct, but the right is reserved to make a call at Havana in any case, and in either direction, without further notice.

For List of Freight Stations See Other Side

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Exhibit F

BALANCE SHEET, SEATRAIN LINES, INC., MARCH 31ST, 1941

ASSETS

Investments:		
Investment in Real Property & Equipment:		
Seatrain New Orleans	1,294,574.57	
Seatrain New York	1,602,700.06	
Seatrain Havana	1,603,150.57	
Seatrain Texas	2,214,894.13	
Seatrain New Jersey	2,219,480.02	
Agitator Dredge	3,295.86	
Havana Crane and Foundation	180,589.80	
New Orleans Crane and Foundation	240,280.62	
Texas City Crane and Foundation	150,326.59	
Hoboken Crane	65,141.12	
Diesel Locomotive	66,000.00	
New Orleans Terminal Equipment	7,059.20	
Texas City Terminal Equipment	3,645.47	
Office Equipment	33,138.86	
General Organization Expense	29,096.94	
	9,713,373.81	
Reserve for Depreciation:		
Floating Equipment	1,990,466.96	
Terminal Property and Equipment	306,574.85	
	2,297,041.81	
		7,416,332.00
Securities of Transportation System Corps.—Unpledged:		
Entire Capital Stock of Hoboken Mfrs. Railroad (at cost)		61,949.49
Long Term Advances to Transportation System Corporations		416,595.60
Miscellaneous Investments:		
Stock—1 Share N. O. Board of Trade	60.00	
Bonds:		
$10,000.00 Erie RR. Ref. & Imp. Mtg. 5's (at cost)	9,550.00	
$20,000.00 U. S. Treasury (at cost)	20,349.94	
		29,959.94
Intangible Assets:		
License, Designs & Developments	50,564.86	
Less Amortization	43,971.67	
		6,593.19
		7,931,430.22

Working Assets and Accrued Income:			
Cash		1,411,983.45	
Marketable Securities		3,981.12	
Traffic Balance owed by other companies		219,140.88	
Insurance Claims against Underwriters		22,005.30	
Miscellaneous Accounts Receivable:			
Due from Government on Mail Contract (See Note Below)	124,076.34		
Canal Bank & Trust Co.—(Restricted Balance)	10,254.21		
Other	161,356.65		
		295,687.20	
Material and Supplies		22,254.56	
Unmatured Dividends and Interest Receivable		41,776.95	
			2,016,829.46
Deferred Debit Items:			
Temporary Advances		6,773.41	
Insurance Premiums Paid in Advance		77,470.70	
Special Deposits		14,137.06	
Open Voyage Expenses		40,126.90	
Other Deferred Debit Items		7,038.31	
			145,546.38
Total assets			10,093,806.06

NOTE: Suit has been filed in the Court of Claims against the U. S. Government for damage in the amount of $3,500,000.00 on the Mail Contract. Included in the amount is $124,076.34 shown above under Miscellaneous Accounts Receivable as earned Mail Contract Revenue due from the United States Government.

216 LIABILITIES

Capital Stock:			
Class "A" Stock (authorized 100,000 Shares) Issued	38,213 6/18 Shares		
Less Held in Treasury	485 6/18 Shares		
	37,728 Shares		
Class "B", Outstanding	500 Shares		
			3,236,500.00
Long Term Debt:			
Funded Debt:			
U. S. Maritime Commission		1,308,075.70	
First Preferred Ship Mortgage Bonds, Series A		1,413,000.00	
First Preferred Ship Mortgage Bonds, Series B		1,500,000.00	
			4,221,075.70
Working Liabilities and Accrued Liabilities:			
Loans and Bills Payable		120,000.00	
Audited Vouchers and Wages Unpaid		124,040.52	
Traffic Balances owed to other companies		14,239.40	
Miscellaneous Accounts Payable		88,796.59	
Unmatured Interest Payable		34,325.39	
Taxes Accrued		375,780.81	
			757,182.71

Deferred Credit Items:		
Operating Reserves	3,000.00	
Open Voyage Revenues	156,036.59	
Other Deferred Credit Items	1,463.35	
		160,499.94
Corporate Surplus:		
Surplus Invested in Property Since December 31, 1912	353,236.15	
Reserves from Income or Surplus	8,545.17	
Total Appropriated Surplus	361,781.32	
Profit and Loss	1,356,766.39	
Total Corporate Surplus		1,718,547.71
Total Liabilities		10,093,806.06

217 *Exhibit G*

Applicant has filed financial reports with the Interstate Commerce Commission annually since its first report to the Commission for the year ended December 31, 1933, such reports being on "Annual Report Form K" as prescribed by the Commission.

For the period of operations during that part of the year 1940 over the route with respect to which this application is made, we refer to our Annual Report to the Interstate Commerce Commission for the year ended December 31, 1940, filed on or about March 27, 1941, and for operations since January 1, 1941, we submit herewith Income Statement (Exhibit G 1) for three months ending March 31, 1941, and Profit and Loss Account (Exhibit G 2) as of March 31, 1941. These statements cover the entire operations of the company.

We know of no accurate method by which the total expenses of the company can be segregated as to our various services. Our books of account are kept in accordance with the rules and regulations prescribed by the Interstate Commerce Commission and under these rules no such segregation is required. However, we have prepared and file herewith an Estimated Income Statement (Exhibit G 3) covering our New York-Texas service for the three months ending March 31, 1941, which statement has been prepared showing actual revenue earned on the route less segregated actual expenses where known, otherwise a proportion of the expenses for all services, with explanations as to how these amounts were determined are shown on attachment to Exhibit G 3.

218 *Exhibit G1*

INCOME STATEMENT, SEATRAIN LINES, INC., THREE MONTHS ENDING MARCH 31ST, 1941

Revenue from Transportation:		
Gross Freight Revenue:		
New York to Havana	145, 110. 17	
New York to New Orleans	120, 578. 71	
Havana to New Orleans	239, 457. 53	
New Orleans to Havana	165, 029. 49	
New Orleans to New York	139. 955. 52	
Havana to New York	95, 509. 90	
New York to Texas City	194, 227, 21	
Texas City to New York	242, 955. 83	
	1, 342, 824. 36	
Less Deductions	140, 863. 20	
Net Freight Revenue		1, 201, 961. 16
Revenue from Operations Other Than Transportation:		
Rent of Locomotive	1, 419. 42	
Miscellaneous—Forwarding Fees	1, 063. 71	
Total Revenue from Operations Other Than Transportation		2, 483. 13
Total Water Line Operating Revenue		1, 204, 444. 29
Water Line Operating Expenses:		
Maintenance	146, 388. 85	
Traffic Expenses	65, 244. 55	
Transportation Expenses	286, 689. 50	
General Expenses	75, 643. 66	
Charter Expenses—Freight Car Rental	91, 742. 05	
Total Operating Expenses		665, 708. 61
Net Revenue from Water Line Operations		538, 735. 68
Water Line Tax Accruals		134, 663. 86
Water Line Operating Income		404, 071. 82
Other Income:		
Income from Funded Securities	132. 54	
Income from Unfunded Securities	6, 210. 24	
Miscellaneous Income—Profit on Exchange	1, 783. 80	
Total Other Income		8, 126. 58
Gross Income		412, 198. 40
Deductions from Gross Income:		
Miscellaneous Rents	18, 911. 28	
Interest on Funded Debt	46, 488. 77	
Interest on Unfunded Debt	600. 17	
Total Deductions		66, 000. 22
Net Income		346, 198. 18
Disposition of Net Income:		
Dividend Appropriations of Income		64, 309. 09
Income Balance Transferred to Profit and Loss		281, 889. 09

219 *Exhibit G2*

PROFIT AND LOSS ACCOUNT, SEATRAIN LINES, INC., MARCH 31ST, 1941

Credit Balance as of December 31, 1940		1,075,774.69
Credit Balance Transferred from Income Account		281,889.09
		1,357,663.78
Miscellaneous Debits—Amortization of License, Designs and Developments		897.39
Credit Balance Carried to Balance Sheet		1,356,766.39

220 *Exhibit G3*

ESTIMATED INCOME STATEMENT, SEATRAIN LINES, INC., NEW YORK–TEXAS SERVICE, THREE MONTHS ENDING MARCH 31, 1941

Estimate based on actual revenue earned on the route less segregated actual expenses where known, otherwise a proportion of the expenses for all services.

Revenue from Transportation:		
Gross Freight Revenue:		
New York to Texas City	194,227.21	
Texas City to New York	242,955.83	
	(1) 437,183.04	
Less Deductions	(2) 23,150.29	
Net Freight Revenue		414,032.75
Estimated Revenue from Operations Other Than Transportation:		
Rent of Locomotive	(3) 567.77	
Forwarding Fees	(4)	
Total Estimated Revenue from Operations Other Than Transportation		567.77
Total Estimated Water Line Operating Revenue		414,600.52
Estimated Water Line Operating Expenses:		
Maintenance	(5) 64,276.54	
Traffic Expenses	(6) 21,204.48	
Transportation Expenses	(7) 100,893.87	
General Expenses	(8) 29,483.86	
Charter Expenses-Freight Car Rental	(9) 21,249.00	
Total Estimated Operating Expenses		237,107.75
Net Estimated Revenue from Water Line Operations		177,492.77
Estimated Water Line Tax Accruals		(10) 38,697.58
Estimated Water Line Operating Income		138,795.19

Estimated Other Income:			
Income from Funded Securities	(11)	53. 02	
Income from Unfunded Securities	(12)	2, 484. 10	
Profit on Exchange	(13)		
Total Estimated Other Income			2, 537. 12
Gross Estimated Income			141, 332. 31
Estimated Deductions From Gross Income:			
Miscellaneous Rents	(14)	8, 889. 35	
Interest on Funded Debt	(15)	32, 802. 09	
Interest on Unfunded Debt	(16)	240. 07	
Total Estimated Deductions			41, 931. 51
Net Estimated Income			99, 400. 80

221 Explanation of Various Items on Estimated Income Statement (Exhibit G–3)

The Gross Freight Revenue for all services of Seatrain Lines, Inc. for three months ending March 31, 1941, as shown on Exhibit G–1, is $1,342,824.36, of which the New York-Texas service contributed $437,183.04, or approximately 32.5%. For expenses which cannot be directly allocated to any one of our services we have, in preparing this statement, considered it fair to charge the New York-Texas service with that proportion of such expense as the percentage of Gross Revenue earned on that route bears to the total freight revenue of all services, which as stated above is 32.5%. Where certain expenses were incurred at the Port of New York and which could not be allocated we have charged the New York-Texas service with one-half of the expense, as a total of four vessels use that port. In other cases where the expense could be directly attributable to vessel expense we have charged the New York-Texas service with two-fifths or 40%, as two of our five vessels are engaged in this service.

With these general comments the following are explanations of the various notes opposite the items on the statement—Exhibit G–3.

(1) Actual Gross Freight Revenue on the New York-Texas service for the first three months ending March 31, 1941.

(2) Actual deductions from Gross Freight Revenue on the New York-Texas service consisting of freight corrections; miscellaneous allowances and absorptions; switching, lighterage, transfer between shipside and our inland terminals, and before and beyond our inland terminals.

(3) 2/5 of the total amount of $1,419.42.

(4) None. These fees are only received in connection with our Cuban service.

(5) This amount is made up of (a) 2/5 of Account WE–1; (b) that proportion of Account WE–2 consisting of actual
222 cost of repairs to the two vessels on this route plus the balance in reserve of the provisional charge for the period; (c) that proportion of Account WE–4 of accrued depreciation on the two vessels on the route on the basis of 5% per annum; (d) 2/5 of Account WE–12; and (e) of Account WE–13 one-half of actual repairs plus balance in reserve of the provisional charge for the period for the terminal and equipment at the Port of New York, plus the total of such charges at the Port of Texas City.

(6) 32.5% of the total traffic expenses of $65,244.55.

(7) This item is made up of actual segregated transportation expenses of the two vessels on this route, amounting to $89,272.08, plus 32.5% of $35,759.35, expenses which cannot be definitely allocated, or $11,621.79.

(8) This item is made up of the actual segregated costs of insurance on the two vessels on this route, namely $20,189.98, plus 32.5% of $28,596.56, other general expenses which cannot be definitely allocated, or $9,293.88.

(9) We have never found any formula for determining the cost of per diem and mileage on the various routes, which expense is one of the largest items in connection with our service. In one of our cases before the Interstate Commerce Commission a figure of $17.70 was used for determining the cost per loaded car handled in the Cuban service and $9.00 per loaded car handled in the coastwise service, which may or may not be fairly accurate, but for this purpose we believe such costs to be reasonable. This item, therefore, is based on the actual number of loaded cars handled in the New York-Texas service during the first three months of 1941, namely 2,361 cars at $9.00 per car.

(10) Account WI–16, the total amount of which, as shown on Exhibit G–1, amounts to $134,663.86, of which $14,012.70 is for revenue taxes incurred on our Cuban service, the other large item being estimated Federal Income Taxes of $109,042.35. The
223 amount shown in this statement is made up as to accrued Property Taxes, 2/5 of those of the State of Texas, 1/2 of those of the States of New York and New Jersey, and the total of Houston and Texas City, or a total of $1,037.09. The balance is 32.5% of the Corporate, Federal Income, Social Security and other taxes, amounting to $37,660.49.

(11) 2/5 of the total amount of $132.54.

(12) 2/5 of the total amount of $6,210.24.

(13) Profit on exchange is only made in connection with our Cuban service.

(14) Account WI–18, to which has been charged 1/2 of the terminal rent at the Port of New York plus the total rent at the Port

of Texas City, plus 2/5 of the office rents at New York, St. Louis, Dallas, plus total office rent at Houston.

(15) Actual amount of interest accrued during the period on the First Preferred Ship Mortgage Bonds outstanding on the two vessels in this service.

(16) 2/5 of the total amount of $600.17.

224 *Exhibit H*

Graham M. Brush, President, is a graduate of the Sheffield Scientific School of Yale University. He served two years in United States Naval Aviation, in the rank of Lieutenant; one year of which was spent in the Bureau of Engineering, Navy Department, Washington, D. C. Thereafter he was Production Manager of Abendroth Brothers, Port Chester, New York, for two years, and Assistant to the President of the New York & Cuba Mail Steamship Company for four years. He has been President of Seatrain Lines, Inc., and predecessor companies, since 1926, and President of the Hoboken Manufacturers Railroad Company from 1932 to the present time. Mr. Brush is in charge of operations.

Joseph Hodgson, First Vice President, a graduate of the University of Alabama, was first employed in the Foreign Freight Office of the Mobile & Ohio Railroad at Mobile, Alabama, in 1897. He was afterwards made Manager of the office of General Agent for Cuba, serving at Havana, representing jointly the Mobile & Ohio Railroad and the Southern Railway. Subsequently he became the joint Agent for the Mobile & Ohio Railroad and Munson Steamship Line at Saint Louis, Missouri, in charge of solicitation and rates. He was thereafter made Foreign Freight Agent of the Missouri Pacific Railroad, Wabash Railroad, The Texas and Pacific Railway, Denver & Rio Grande Western Railroad, and the International-Great Northern Railroad, the so-called Gould Lines. In 1909 he came to New York as General Freight Agent for the New York & Cuba Mail Steamship Company and was later appointed Vice President in charge of Traffic. He remained in that capacity until 1928 when he became First Vice President of Overseas Railways, Inc. This company was later reorganized and became Seatrain Lines, Inc., of which Mr. Hodgson has been First Vice President since its organization.

225 George S. Amory, Vice President and Treasurer, is a graduate of Cornell University. From April 1917 to January 1919 he served as First Lieutenant in the 303rd Infantry. From 1919 to 1926 he was with General Motors Acceptance Corporation as European Representative. From 1927 to 1930 he

was Vice President and Treasurer of New York Triplex Safety Glass Company, Inc. In 1931 he became Vice President and Treasurer of Seatrain Lines, Inc.

Edward K. Morse, Vice President and Secretary, a graduate of Yale College, was first employed in September 1909 by Munson Steamship Line, 82 Beaver Street, New York. Remained with that company until June 1932, except for the period March-December 1918, when he was a member of the Contraband Committee of the War Trade Board, Washington, D. C. He was Freight Traffic Manager of Munson Steamship Line in 1932, when he resigned to become Vice President of this Company.

226 *Exhibit I*

Handlings of Seatrain Lines, Inc., between New York and Texas City during the period January–March, inclusive, 1941, with comment thereon:

SOUTH-BOUND

ICC Index	Commodity	Tons	Revenue
40	Barley	774	$3,848.38
164	Coffee and Tea	786	5,599.42
352	Rough marble	111	399.95
392	Crushed limestone, talc, slate	190	724.78
431	Box, crate and cooperage material	8	109.97
442	Crude rubber	4,533	17,922.95
443	Cork waste	26	202.80
450	Liquified gas and naphtha	32	280.19
452	Lubricating oil, petroleum	355	2,128.23
491	Billets, iron or steel	292	1,328.57
511	Iron and steel pipe and fittings	1,312	6,712.64
512	Wire, iron or steel	562	2,627.66
513	Miscellaneous iron and steel products	1,933	9,744.73
520	Copper matte	513	1,629.80
521	Tubing, copper, brass or bronze	15	131.02
530	Machinery, etc	1,867	22,449.26
540	Cement, building	35	288.10
551	Brick, N. O. S., and tile	40	183.04
552	Building terra cotta	145	995.73
590	Agricultural implements	155	1,559.87
591	Fire fighting apparatus	9	177.33
593	Automobile tires	43	396.33
610	Metal furniture	13	133.14
611	Furniture, other than metal	16	147.73
620	Wine and liquor, alcoholic	250	2,457.49
650	Newsprint paper	268	1,128.01
651	Printing paper	213	1,306.49
662	Ammunition	15	132.36
671	Bagging and bags	20	117.58
680	Canned food products	865	5,383.52
691	Paints in oil and varnishes	369	2,406.75
694	Wrapping paper and paper bags	729	4,295.69
695	Pulpboard	49	319.94
696	Shingles, asbestos, and roofing felt	355	1,617.52
698	Soap and washing compound	687	3,577.54
699	Window glass	27	206.06
700	Glass bottles, jars and glasses	387	2,253.80
701	Miscellaneous manufactures	10,568	73,474.68
710	Carloaders' and package cars	1,603	15,803.13
		30,208	194,227.21

NORTH-BOUND.

ICC Index	Commodity	Tons	Revenue
41	Rice	7,454	$32,130.22
50	Wheat flour	9,232	69,119.49
104	Edible nuts, fruit juices	682	5,172.35
391	Sulphur	10,351	38,555.32
523	Clay, N. O. I. B. N.	383	1,302.92
420	Lumber	1,459	6,493.85
450	Naphtha	94	731.32
451	Diesel fuel oil (in bulk)	12,782	23,220.06
452	Lubricating oil, petroleum	411	2,926.61
462	Peanut oil	60	335.11
513	Tinplate	189	645.40
530	Machinery, etc.	212	2,405.56
640	Muriate of potash	9,205	24,756.67
671	Bagging and bags	20	108.75
680	Canned food products	66	292.67
692	Paper bags, N. O. I. B. N.	276	1,235.98
694	Wrapping paper, paper bags	3,447	17,543.86
695	Pulpboard, N. O. I. B. N.	523	2,199.15
701	Miscellaneous manufactures	6,837	43,620.49
710	L. C. L.	2	51.84
		63,494	342,955.83

January–March, inclusive, 1941

	Tons	Revenue
South-bound	30,268	194,227.21
North-bound	63,494	342,955.83
	93,752	437,183.04
	Multiply by 3	
	281,256	1,311,549.12
Add 11% revenue		144,270.40
	281,256	[1] 1,455,819.52
Add	93,752	[2] 437,183.04
	375,008	1,893,002.66

[1] Prospective result April–December incl.
[2] January–March incl.

COMMENT

The line has been operating practically at capacity during this period, therefore, it is expected that tons handled during the calendar year 1941 will be approximately four (4) times the amount shown above, or 375,008 tons.

As regards revenue, the rate increases recently authorized, and effective April 7, 1941, appear to have increased it about 11%. Therefore, if we multiply the January–March figures by three (3) and add 11% to the result, we have an approximate revenue forecast for the last nine (9) months of the calendar year of $1,455,819.52, which when added to the January–March figure shows a prospective total revenue for the calendar year 1941 of $1,893,002.66.

It will be noted that during the period January–March inclusive, 2,361 loaded cars were handled, an average of 91 loaded cars per voyage. This does not include 12,782 tons of Diesel fuel oil handled in side tanks.

229 *Exhibit J*

Seatrain service between New York and Texas City has been and will be of benefit to particular industries. Northbound it is convenient for the handling of scrap metal in open top cars and carbon black, paper, and lumber in box cars, these being typical commodities which are injured by frequent handling. The same is true of carbon black when shipped in paper bags and this commodity is also handled in bulk in hopper cars. Seatrain service has been of immediate benefit to the potash and sulphur industries; both of these commodities are handled in bulk in box cars and under present stringent conditions in the coastwise charter market this service has been especially helpful, as will be noted from Exhibit I filed herewith. We have been informed that the service will be helpful to the Dow Chemical Company and the Union Carbide Company, both of which are constructing new plants, one at Velasco and one at Texas City, also to the tin smelter which is to be constructed at Texas City.

South-bound most of the handlings are what the trade refers to as general cargo and the advantages of Seatrain for the handling of miscellaneous manufactured goods are well known. Specifically the service has been helpful in connection with shipments of machinery and of large and heavy cylinders for the oil industry which ordinary steamers cannot handle and which, in many cases, will not clear on the railroads' right of way. Liquids in tank cars and cargo under refrigeration are also handled.

239 INTERSTATE COMMERCE COMMISSION,
BUREAU OF ACCOUNTS, NEW YORK OFFICE,
New York, N. Y., December 6, 1941.

Mr. JOHN B. BAIN,
New York, N. Y.

DEAR SIR: In accordance with your instructions, I have made a special investigation of the records of Seatrain Lines, Inc., 39 Broadway, New York, N. Y., in connection with its application, Docket No. W-543, filed with the Commission, for a certificate as a common carrier of property to continue an operation not existing January 1, 1940, but existing February 1, 1941.

The operation referred to is that instituted in May 1940, of performing weekly transportation service of property on regular schedules between New York, N. Y., and Texas City, Texas, and at times via Havana, Cuba.

The information and exhibits contained in the carrier's application were carefully checked with the reports and statements on file in New York, N. Y., and found to be correct.

In the questionnaire, the principal information desired concerning new operations is that referred to in questions 34, 35 and

36, such as: who encouraged the inauguration of the service, the need therefor, the amount of traffic furnished, and the effect upon shippers if the application was denied.

The information supplied by the applicant in answer to these questions is set forth in data attached to the questionnaire which is supported by the applicant's records and files, and which I feel covers the matter satisfactorily.

My opinion in answer to question 37, that the applicant's service is justified and should be maintained in the public interest, is based upon the data referred to above, and the increase of approximately $174,000.00 in the applicant's net income for the quarter ending March 31, 1941, as compared to quarter ending March 31,
1940, shown by copy of income statement attached to the
240 questionnaire. The greater part of this increase is considered by the Treasurer, Mr. George S. Amory, as being attributable to the addition of service to Texas City.

My opinion is further strengthened by learning from Vice President E. K. Morse, that at the present time, Seatrain is the only line furnishing steamer service between New York and Texas ports, other lines, such as "Newtex," "Mooremac," "Lykes," "Morgan," and "Clyde-Mallory," having withdrawn service and sold their ships, or suspended service. There remain now only two companies, beside Seatrain, operating steamers from North Atlantic ports to Texas ports, namely, Southern Steamship Company from Philadelphia to Houston, and Bull Steamship Line from Port Newark and Baltimore to Corpus Christi and Beaumont, and both have greatly curtailed their operations.

Two copies of the questionnaire, which has been filled out from the applicant's records and information supplied by Vice President Morse, are attached. A copy of the application is returned herewith.

Yours very truly,

WILSON F. MARTIN,
B.

Examiner.

Inc.

241 Docket No. W-543

QUESTIONNAIRE RE APPLICATION FOR ☒ CERTIFICATE AS COMMON CARRIER BY WATER ☐ PERMIT AS CONTRACT CARRIER BY WATER

To be answered by Commission field representatives and returned to Bureau of Water Carriers, Washington, D. C.

Application of Seatrain Lines, Inc., Delaware, 39 Broadway, New York, New York.

Application for the appropriate authority: (check applicable status):

☐ to continue an operation in existence January 1, 1940, and continuously thereafter ☒ to continue an operation not existing January 1, 1940, but existing February 1, 1941	as a	☒ common carrier ☐ contract carrier	of ☐ passengers ☒ property

by water in interstate or foreign commerce (as defined in section 302 (i)).

242 I, E. K. Morse, Secretary of Seatrain Lines, Inc., a Delaware corporation, hereby certify that the following persons have been duly elected to and now hold the office of Director of Seatrain Lines, Inc.:

Name and Residence

George S. Amory, Tuxedo, N. Y.
Edgar A. G. Bright, New Orleans, La.
Walter L. Conwell, Darien, Conn.
Hunt T. Dickinson, Locust Valley, L. I., N. Y.
C. G. Hayes, Dallas, Texas.
Joseph Hodgson, Montclair, N. J.
Thomas F. Milbank, Washington, D. C.
E. K. Morse, Plainfield, N. J.
C. E. Perkins, St. Louis, Mo.
John G. Pew, Chester, Pa.
E. Mortimer Ward, Locust Valley, L. I., N. Y.
Graham M. Brush, Greenwich, Conn.

I, E. K. Morse, Secretary of Seatrain Lines, Inc., a Delaware corporation, hereby certify that the following persons have been duly elected to and now hold the offices in the Seatrain Lines, Inc. set opposite their respective names:

Name, Office, and Residence

Graham M. Brush, President, Greenwich, Conn.
Joseph Hodgson, Vice President, Montclair, N. J.
E. K. Morse, Vice Pres. & Secretary, Plainfield, N. J.
George S. Amory, Vice Pres. & Treasurer, Tuxedo, N. Y.
Claude de Veze, Assistant Secretary, New Orleans, La.
Donald W. Smith, Assistant Secretary, Verona, N. J.

Witness my hand and the corporate seal of the said Seatrain Lines, Inc. this 18th day of November 1941.

E. K. MORSE.

243 The so-called "grandfather" clause relating to common carriers is included in section 309 (a); which reads as follows:

"Except as otherwise provided in this section and section 311, no common carrier by water shall engage in transportation subject to this part unless it holds a certificate of public convenience and necessity issued by the Commission: *Provided, however, That, subject to section 310, if any such carrier or a predecessor in interest was in bona fide operation as a common carrier by water on January 1, 1940, over the route or routes or between the ports with respect to which application is made and has so operated since that time (or, if engaged in furnishing seasonal service only, was in bona fide operation during the seasonal period, prior to or including such date, for operations of the character in question) except, in either event, as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission as provided in subsection (b) of this section and prior to the expiration of one hundred and twenty days after this section takes effect. Pending the determination of any such application, the continuance of such operation shall be lawful.* If the application for such certificate is not made within one hundred and twenty days after this section takes effect, it shall be decided in accordance with the standards and procedure provided for in subsection (c), and such certificate shall be issued or denied accordingly. Any person, not included within the provisions of the foregoing proviso, who is engaged in transportation as a common carrier by water when this section takes effect may continue such operation for a period of one hundred and twenty days thereafter without a certificate, and, if application for such certificate is made to the Commission within such period, the continuance of such operation shall be lawful pending determination of such application." [Italics supplied.]

The so-called "grandfather" clause relating to contract carriers is included in section 309 (f), which reads as follows:

"Except as otherwise provided in this section and section 311, no person shall engage in the business of a contract carrier by water unless he or it holds an effective permit, issued by the Commission authorizing such operation: *Provided, That, subject to section 310, if any such carrier or a predecessor in interest was in*

244 *bona fide operation as a contract carrier by water on Janu-*

ary 1, 1940, over the route or routes or between the ports with respect to which application is made, and has so operated since that time (or, if engaged in furnishing seasonal service only, was in bona fide operation during the seasonal period, prior to or including such date, for operations of the character in question) except, in either event, as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such permit, without further proceedings, if application for such permit is made to the Commission as provided in subsection (g) of this section and prior to the expiration of one hundred and twenty days after this section takes effect. Pending the determination of any such application, the continuance of such operation shall be lawful. If the application for such permit is not made within one hundred and twenty days after this section takes effect, it shall be decided in accordance with the standards and procedure provided for in subsection (g), and such permit shall be issued or denied accordingly. Any person, not included within the provision of the foregoing proviso, who is engaged in transportation as a contract carrier by water when this section takes effect may continue such operation for a period of one hundred and twenty days thereafter without a permit, and, if application for such permit is made to the Commission within such period, the continuance of such operation shall be lawful pending the determination of such application." [Italics supplied.]

The facts necessary for a proper determination of the rights covered by the applications may be grouped under four headings:

I. Common or Contract Carrier.

II. Operations Conducted on or Before January 1, 1940.

III. Operations Instituted After January 1, 1940, and Before February 1, 1941.

IV. Exempt Operations.

I. Common or Contract Carrier.

Section 302 (d) defines a common carrier and reads as follows:

"The term 'common carrier by water' means any person which holds itself out to the general public to engage in the transportation by water in interstate or foreign commerce of passen-
245 gers or property or any class or classes thereof for compensation, except transportation by water by an express company subject to part I in the conduct of its express business, which shall be considered to be and shall be regulated as transportation subject to part I."

This is a familiar definition of a common carrier similar to the definition of a common carrier appearing in Parts I and II of the Act.

The term "contract carrier" is defined in section 302 (e) which reads as follows:

"*The term 'contract carrier by water' means any person which, under individual contracts or agreements, engages in the transportation (other than transportation referred to in paragraph (d) and the exception therein) by water of passengers or property in interstate or foreign commerce for compensation.* The furnishing for compensation (under a charter, lease, or other agreement) of a vessel, to a person other than a carrier subject to this Act, to be used by the person to whom such vessel is furnished in the transportation of its own property, shall be considered to constitute, as to the vessel so furnished, engaging in transportation for compensation by the person furnishing such vessel, within the meaning of the foregoing definition of 'contract carrier by water'. Whenever the Commission, upon its own motion or upon applicatin of any interested party, determines that the application of the preceding sentence to any person or class of persons is not necessary in order to effectuate the national transportation policy declared in this Act, it shall by order exempt such person or class of persons from the provisions of this part for such period of time as may be specified in such order. The Commission may by order revoke any such exemption whenever it shall find that the application of such sentence to the exempted person or class of persons is necessary in order to effectuate such national transportation policy. No such exemption shall be denied or revoked except after reasonable opportunity for hearing." [Italics supplied.]

The underlined portion of the above language is the basic definition and is similar to the definition in Part II of the Act which will be familiar to those members of the Commission's field staff who are assigned to the Bureau of Motor Carriers. The term "contract carrier" may not be a familiar term to the staff of the Bureau of Accounts, and a brief explanation thereof may be helpful. It is first to be noted that a contract carrier is a carrier for hire but one that is not a common carrier. If, therefore, a carrier transports property for the public generally or any class or classes thereof, it probably is a common carrier despite the fact that it makes individual contracts with all shippers whom it serves. While no hard and fast rule can be laid down, a true contract carrier is one who voluntarily restricts his service to trans-
246 portation of a limited number of commodities and serves materially less than all shippers of each such commodity.

The balance of the quoted definition, which includes provision for a discretionary exemption, will need some explanation. Administrative ruling No. 8 states the view of the Bureau of Water Carriers as to the effect of the definition.

In answering the questionnaire no consideration need be given to the exemption provision quoted.

The answers to the questions which follow should enable the Commission to determine whether a particular carrier is a common carrier or a contract carrier by water. (Questions 1–12 refer to transportation of property only.)

Q. 1. Does the carrier make contracts with each of its shippers covering transportation greater in scope than that covered by the individual bill of lading issued?

A. No.
(Yes or No)

Q. 2. If the answer to question 1 is "No", does carrier make such contracts with any of its shippers?

A. No. If answer is "Yes", explain fully.
(Yes or No)

Q. 3. If such contracts are made, do they cover a series of shipments to be made over a period of time?

A. ----------
(Yes or No)

Q. 4. Submit copy of typical contract. If the contracts are oral give a full description of typical contracts.

A. ----------

Q. 5. Does the usual contract place the shipper under any obligation, other than to pay for the transportation?

A. ---------- If answer is "Yes", explain fully.
(Yes or No)

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247 Q. 6. For how many shippers does the carrier transport property?

A. 360.

Q. 7. How many different commodities does the carrier transport?

A. 170 (approximately).

Q. 8. Does the nature of the commodities transported require special facilities or equipment?

A. Yes. If answer is "Yes," describe.

The vessels are especially designed to carry approximately one hundred (100) loaded freight-train cars. The cars are transferred to the vessels by means of especially constructed bridge cranes. The vessels are also equipped with tank compartments for the shipment of fuel oil.

Q. 9. Does the carrier actively solicit all shippers of the commodities he transports, by means of soliciting freight agents, advertisements, direct mail, or otherwise?

A. Yes, by soliciting agents and minor advertising.

Q. 10. Does carrier similarly solicit transportation of additional commodities not previously transported?

A. No.

Q. 11. Does the carrier as a practice refuse to transport for certain shippers while transporting the same commodities for other shippers?

A. No. If answer is "Yes," explain fully.

Q. 12. Does the carrier interchange freight with common carriers by railroad, water, pipeline, or motor vehicle?

A. Yes—with rail carriers only.

If the answer to the preceding question is "Yes," explain in detail how such traffic is handled and particularly whether through bills of lading are issued; if not, whether one carrier advances the charges of the other, collecting the total from the consignor or consignee; and whether the originating carrier arranges or contracts for the transportation by the second carrier.

248 Through bills of lading are issued.

Q. 13. If passengers are transported physically within a single State only, does applicant transport such passengers on through tickets in connection with another carrier to or from another State?

A. No passengers.

Q. 14. If applicant transports passengers for hire, is any of such transportation done by vessel charter or group contract?

A. No passengers.

If the answer to the preceding question is "Yes," advise in detail as to such group transportation, indicating the number of parties so transported in last year.

II. Operations Conducted on or Before January 1, 1940

As shown by the so-called "grandfather" clauses quoted above, an applicant, to have a right to a certificate without proof of public convenience and necessity, or to a permit without proof of consistency with the public interest and the national transportation

policy, must have been in bona fide operation on January 1, 1940, and continuously since that time. The Commission in its administration of Part II of the Act, which contains a similar provision, has held that in determining the operations on the "grandfather" date consideration may be given to the operation in the preceding six months. In the case of water transportation a longer period prior to the "grandfather" date may have to be considered. Information should be obtained as to the last date prior to January 1, 1940, on which any given port was served. Ports may be served frequently or infrequently by water. For example, a carrier operating a single vessel between New York and the Pacific Coast cannot serve any port more than once in three months and may engage in much less frequent service to many ports. In considering whether the service is continuous or not weight must be given to the length of time required for a round trip and the normal frequency of carrier's service. For convenience, chart A is attached on which the following facts should be shown.

249 NOTE: The questions follow the language of the statute in referring to "ports or points" served. Do not list individual "points" within a "port"; but if "points" served can not be identified by name of a "port," identify by municipality or nearest similar designation possible. (Questions 15–20 refer to transportation of property only.)

Q. 15. Show on chart A, column 1, all ports or points served on or within one year prior to January 1, 1940.

Q. 16. Show on chart A, column 2, last date prior to January 1, 1940, on which applicant served each such port or point.

Q. 17. Show on chart A, column 3, approximate number of calls at such port or point within year preceding January 1, 1940, i. e., "365" equals daily service; "52" equals weekly service; "12" equals monthly service, etc.

Q. 18. Show similarly on chart A, column 4, approximate number of calls per annum made at each such port or point since January 1, 1940.

Q. 19. Show on chart A, column 5, the number of commodities loaded at each port or point.

Q. 20. Show on chart A, column 6, the number of commodities discharged by applicant at each such port or point.

NOTE: Have applicant prepare a list of individual commodities transported from, to, or via each port or point served by applicant, and after checking to the extent felt necessary by the field representative to establish accuracy of the list, attach such list hereto, identified by reference to questions 19 and 20. Where more than 10 commodities are handled to, from or via a port,

estimate number of commodities and require carrier to list only the ten principal commodities as follows:

General commodities, principal of which are_____
_____

Q. 21. Show on chart A, column 7 and 8, ports or points between which passengers were transported regularly on or prior to January 1, 1940, and since.

Q. 22. As to any port or point not served with reasonable regularity as to either passengers or property since January 1, 1940, submit herewith detailed explanation of the irregularity of service, with your comments.

Q. 23. As to any port or point claimed in application but not served within year prior to January 1, 1940, as to either passengers or property, or since, submit herewith explanation of applicant's basis for claiming right to such port or point, with your comments.

NOTE: A carrier operating on the Mississippi River may claim rights to transport property as either a common or contract carrier from Minneapolis to New Orleans, including all intermediate ports or points. The records of the carrier may disclose that prior to the "grandfather" date, and since, the carrier has not actually served certain of the intermediate points. The facts, however, may show that the carrier held itself out to perform such transportation and failed to do so only because no shipper wished goods transported to certain of the intermediate points. The Commission and the courts have held that the holding out theory is a sound one if the actual operations reasonably show the holding out to be bona fide. For example, if the carrier on the Mississippi River had actually only served Minneapolis, St. Louis, Memphis, and New Orleans, it could hardly be said that his holding out entitled him to operating authority to serve all intermediate points between Minneapolis and New Orleans. On the other hand, if the carrier did actually hold out to serve or was under contract to serve intermediate points, and can show that it did in fact serve any such port or point when reasonably called on to do so, the holding out or commitment would probably justify granting of authority to all intermediate points. The same is true after the "grandfather" date. The mere fact that since January 1, 1940, a carrier has not served every intermediate point does not mean that the service has not been continuous.

III. Operations Instituted After January 1, 1940, and Before February 1, 1941.

NOTE: Questions 24–29 refer to transportation of property only. See attachment.

Q. 24. Show on chart B, column 1, ports or points not served on or prior to January 1, 1940, but served after January 1, 1940, and before February 1, 1941.

Q. 25. Show on chart B, column 2, first date prior to February 1, 1941, on which port or point served.

Q. 26. Show on chart B, column 3, last date on which port or point served.

Q. 27. Show on chart B, column 4, the number of calls on annual basis since service was inaugurated, i. e., "365" equals daily service; "52" equals weekly service; "12" equals monthly service, etc.

Q. 28. Show on chart B, column 5, the number of commodities loaded at each such port or point.

Q. 29. Show on chart B, column 6, the number of commodities discharged at each such port.

NOTE: See attachment.

Have applicant prepare a list of individual commodities transported from, to, or via each port or point served by applicant, and after checking to the extent felt necessary by the field representative to establish accuracy of the list, attach such list hereto, identified by reference to questions 28 and 29. Where more than 10 commodities are handled to, from, or via a port, estimate number of commodities and require carrier to list only the ten principal commodities as follows:

General commodities, principal of which are.....

---

251 Q. 30. Show on chart B, columns 7 and 8, ports or points between which passengers have been regularly transported since service was instituted.

Q. 31. As to any port or point not served with reasonable regularity as to either property or passengers since inception of service, submit herewith detailed explanation for the irregularity of service. See note on pages 8 and 9.

Q. 32. Name other carriers by water who are engaged in the same or similar operations as to property or passengers. None—(see answer to item 6 on page 5 of application.)

NOTE. Data concerning other modes of transportation is available from Commission's records.

Q. 33. Describe applicant's equipment in detail used in this service, whether owned or chartered. See Exhibit "B" question 3, of Form B. W. C. 2.

Name of vessel	Owned or chartered	Indicated horse-power	Cargo capacity in net tons	Passenger carrying capacity
Seatrain Texas	Owned	8,800	100 Railroad Cars	
Seatrain New Jersey	Owned	8,800	100 Railroad Cars	

Q. 34. What persons or organizations encouraged applicant to institute this service? See attachments for answers to questions 34, 35, & 36.

Q. 35. Have applicant submit proof thereof in the form of correspondence or sworn statements, and attach hereto.

Q. 36. Have applicant furnish statement from users thereof as to the need for applicant's services, indicating:

252 Refers to Questions 28 and 29.

PORT OF NEW YORK

General Commodities, Principal of which are:

Loaded		Discharged	
1940	1st 6 months 1941	1940	1st 6 months 1941
(130)	(130)	(38)	(40)
Barley	Rubber, Crude	Rice	Rice
Rubber, Crude	Iron & Steel Pipe and Forgings	Flour, wheat	Flour, wheat
Iron & Steel Pipe & Forgings	Plate or Sheet, Iron or Steel	Salt	Nuts, edible
Machinery & Boilers	Canned Food Products	Sulphur	Sulphur
Internal Combustion Engines & Parts	Soap & Washing Compounds	Lumber	Lumber
Roofing Felt, unsaturated	Candy & Chewing Gum	Potash, Muriate of	Potash, Muriate of
Candy	Rugs & Carpets	Wrapping Paper	Wrapping Paper & Carbon Black Paper Bags
Can Stock (Ends)	Can Stock (Ends)	Carbon Black	Scrap Metals
Canned Food Products	Drugs & Medicines	Scrap Metals	Diesel Fuel Oil (In side Tanks)
Package Cars LCL	Package Cars LCL	Diesel Fuel Oil (In ships' Tanks)	

PORT OF TEXAS CITY

General Commodities, Principal of which are:

Loaded		Discharged	
1940	1st 6 months 1941	1940	1st 6 months 1941
(38)	(40)	(130)	(130)
Rice	Rice	Barley	Rubber, Crude
Flour, wheat	Flour, wheat	Rubber, Crude	Iron & Steel Pipe and Forgings
Salt	Nuts, edible	Iron & Steel Pipe and Forgings	Plate or Sheet, Iron or Steel
Sulphur	Sulphur	Machinery & Boilers	Canned Food Products
Lumber	Lumber	Internal Combustion Engines & Parts	Soap & Washing Compounds
Potash, Muriate of	Potash, Muriate of	Roofing Felt, unsaturated	Candy & Chewing Gum
Wrapping Paper	Wrapping Paper and Paper Bags	Candy	Rugs & Carpets
Carbon Black	Carbon Black	Can Stock (Ends)	Can Stock (Ends)
Scrap Metal	Scrap Metals	Canned Food Products	Drugs & Medicines
Diesel Fuel Oil (In ships' tanks)	Diesel Fuel Oil (In ships' tanks)	Package Cars LCL	Package Cars LCL

Figures in parenthesis indicates approximate number of bulk commodities handled exclusive of commodities handled in LCL Package Cars.

253 *Data Submitted by the Applicant in Response to Questions 34, 35, and 36 of Questionnaire, Sheets Nos. 1 to 69, inclusive.*

254 SEATRAIN LINES, INC.

TRAFFIC DEPARTMENT

39 Broadway

NEW YORK, N. Y., *December 5, 1941.*

File—B

Mr. W. F. MARTIN,
Examiner, Interstate Commerce Commission,
108 Sub-Treasury Building, New York, New York.

DEAR MR. MARTIN: Supplementing my letter of December 4th, in which was enclosed a memorandum of the cargo shipped by certain of the firms listed in my previous letter of November 26th,

I now enclose a list of the firms shown who did not make any shipments on our steamers during the first quarter of 1941 between Texas City and New York. This memorandum indicates when they have shipped.

Very truly yours,

E. K. MORSE,
Vice President.

EKM:MG.
Enc.

255 NEW YORK, NEW YORK, *December 4, 1941.*

Our records indicate the following on shippers and consignees as listed below.

AMERICAN CRANBERRY EXCHANGE

There is no record of shipments from January 1st, 1941, to March 31st, 1941.

This is a seasonal movement of cranberries which commenced with the sailing of October 3rd, 1941, from Hoboken.

AMERICAN METAL COMPANY, LTD.

There is no record of shipments from January 1st, 1941, to March 31st, 1941.

However, a regular movement of scrap battery plates and other scrap metal started with a shipment of five cars on our sailing of April 16th, 1941, from Texas City.

CERTAINTEED PRODUCTS CORPORATION

There is no record of shipments from January 1st, 1941, to March 31st, 1941.

Shippers were interested in Texas City-Havana service, and we quoted on fifteen to twenty carloads to move early in 1941. Our service was discontinued in December 1940, so the movement was diverted to the New Orleans-Havana service.

DRESSER MANUFACTURING COMPANY

There is no record of shipments from January 1st, 1941, to March 31st, 1941.

The 1941 movement of pipe fittings started with the sailing of June 3rd, 1941, from Hoboken.

256 EASTERN TRAFFIC BUREAU, INC.

There is no record of shipments from January 1st, 1941, to March 31st, 1941.

The 1941 movement of confectionery started with the sailing of July 11th, 1941, from Hoboken.

HOUSTON WAREHOUSE AND TRANSFER ASSOCIATION

There is no record of shipments from January 1st, 1941 to March 31st, 1941.

This organization is presumably indirectly interested and will not show as shippers or consignees.

HUEY AND PHILIP HARDWARE COMPANY

There is no record of carload shipments to this consignee in Dallas between January 1st, 1941, and March 31st, 1941.

We understand, however, that there was a regular movement in the consolidated cars of the Gulf Carloading Company which we are unable to record.

MCALESTER FUEL COMPANY OF DALLAS

There is no record of shipments from January 1st, 1941, to March 31st, 1941.

This company ships petroleum products in tank cars and packages. The movement started in April 1941 from Texas City.

THE RUBEROID COMPANY

There is no record of shipments from January 1st, 1941, to March 31st, 1941.

The movement of roofing materials, etc. from this shipper started on our sailing of June 6th, 1941, from Hoboken.

257 S. S. STAFFORD INC.

There is no record of shipments from January 1st, 1941, to March 31st, 1941.

The movement of writing ink started July 23rd, 1941, from Hoboken.

258 SEATRAIN LINES, INC.

TRAFFIC DEPARTMENT

Cable Address: Searails

DECEMBER 4, 1941.

File-B

Mr. W. F. MARTIN,
Examiner, Interstate Commerce Commission,
108 Sub-Treasury Building, New York, New York.

DEAR MR. MARTIN: In my letter of November 26th I enclosed copies of letters written to the Maritime Commission last summer by various commercial and other interests, the general tenor of which letters was a request that the Maritime Commission would not withdraw our steamers from service for British use.

You inquired as to how much cargo the writers of these letters gave us during the first months of 1941, and we now hand you a statement indicating that during that period most of the commercial interests which wrote the letters favored us with a material amount of business.

Some of the names on this list, of course, were public bodies, such as the Merchants Association of New York, which are not shippers; and others who are shippers have a seasonal business and were not shipping during this particular period, although they have shipped since. Examples of these are the American Cranberry Exchange and the Eastern Traffic Bureau.

Very truly yours,
EKM:CM.

E. K. MORSE,
Vice President.

259 STATEMENT OF TONNAGE HANDLED BETWEEN HOBOKEN AND TEXAS CITY FOR ACCOUNT OF CERTAIN SHIPPERS AND CONSIGNEES ON SAILINGS, JANUARY 3 TO MARCH 28, 1941

Shipper or consignee with associates and subsidiaries	Commodity	Cars	Weight	Total	
				Cars	Weight
American Chain & Cable Co. (Page Steel & Wire Co.).	Steel Wire	8	701, 584		
	Fencing	1	43, 601		
	Wire Rope	3	182, 031		
				12	927, 216
American-La France-Foamite Corp.	Fire Apparatus	3	31, 141	3	31, 141
Bering Cortes Hardware Co.	Rubber Hose	1	35, 450		
	Bath Tubs & Lavatories	1	49, 054		
	Stoves & Parts	1	24, 500		
				3	109, 004
Burrus Mill & Elevator Co.	Flour	3	241, 080	3	241, 080
Butler Brothers	Carpeting and Felt Base Rugs	20	715, 949	20	715, 949
Carbide & Carbon Chemical Corp. (National Carbon Co.) (Electro-Metallurgical Sales Corp.) (Linde Air Products Co.).	Distilling Apparatus	7	176, 560		
	Ferro Silicon	1	81, 396		
	Ferro Manganese, Chrome & Ferro Silicon.	1	75, 941		
	Electrodes	3	128, 772		
	Generators & Engines Combined.	2	81, 040		
	Machinery	2	60, 000		
	Crude Sulphur	18	2, 006, 900		
				34	2, 804, 609
	Carried Forward			75	4, 625, 999

Shipper or consignee with associates and subsidiaries	Commodity	Cars	Weight	Total Cars	Total Weight
260 Church & Dwight Co., Inc.	Bicarbonate of Soda	1	45,073	1	45,073
Collin County Mill & Elevator Co.	Flour	15	1,281,880	15	1,281,880
Commercial Metals Co., Ltd.	Scrap Iron	2	246,880	2	246,880
Consolidated Steel Corp., Ltd.	Machinery	5	284,500	5	284,500
Cox Fence Company of Houston.	Steel Wire	1	42,420		
	Steel Angles	1	50,030	2	92,450
Equitable Paper Bag Co.	Wrapping Paper & Paper Bags	15	1,402,400		
	Wrapping Paper	24	1,975,175		
	Paper Bags	1	83,500		
	Machinery	1	24,000	41	3,485,075
Firestone Tire & Rubber Co.	Crude Rubber	70	6,514,478		
	Latex	3	173,399	73	6,687,877
The Flintkote Co.	Roofing Felt	10	460,028	10	460,028
Geffen Industries, Inc.	Wine, in tank cars	3	159,020	3	159,020
Houston Milling Co., Inc.	Flour	66	6,053,460	66	6,053,460
International Agricultural Corp. (Union Potash & Chemical Co.).	Potash	44	4,769,500	44	4,769,500
Jefferson Lake Sulphur Co.	Crude Sulphur	15	1,665,600	15	1,665,600
David J. Joseph Co.	Scrap Iron	9	1,016,960	9	1,016,960
261 The M. W. Kellogg Co.	Distilling Apparatus	11	517,660		
	Structural Steel	1	45,400		
	Machinery	3	122,240		
	Condensers	5	300,320		
	Internal Combustion Engines & Parts	8	584,500		
	Motor Vehicle	1	28,200		
	Oxide of Alumina	1	93,605	30	1,690,425
Thomas J. Lipton, Inc.	Tea	15	711,809	15	711,809
South Texas Cotton Oil Co.	Peanut Oil in tank cars	1	60,180	1	60,180
R. T. Vanderbilt Co.	Titanium Pigments	1	42,954	1	42,954
Wickwire Spencer Steel Co. (American Wire Fabrics Co.).	Wire Cloth	2	62,600		
	Wire Rope	1	70,320	3	132,920
Wyatt Metal & Boiler Works.	Steel Plates	16	1,516,686		
	Steel Pipe	1	126,000	17	1,642,686
Grand total				428	35,157,986

O'Connor Petroleum, Inc. (Eastern States Petroleum Co.), Diesel Fuel Oil in ship's tanks—approx. 77,737.13 bbl.

262

SEATRAIN LINES, INC.

39 BROADWAY, NEW YORK, N. Y.

Cable Address: Searails

NOVEMBER 26, 1941.

File–B

Mr. W. F. MARTIN,
Examiner, Interstate Commerce Commission,
108 Sub-Treasury Building, New York, New York.

DEAR MR. MARTIN: In connection with the field investigation which you are making with relation to our application for a certificate to continue operation between New York Harbor and Texas City, Texas, you have shown me questions 34, 35, and 36, out of the form on which you are expected to make a return of your investigation.

As to questions 34 and 35, I enclose affidavit of our Executive Vice President, Mr. Joseph Hodgson, which outlines the development of the plans of this company for a Texas service, and also refers to testimony placed before the Commission in Docket 25546, all of which indicate certain firms which encouraged us to institute that service and gave evidence of their encouragement by their willingness to testify in this case, which was the application of the Missouri Pacific Railroad Company and the Texas & Pacific Railway Company, under Section 5 (19–21) of Interstate Commerce Commission Act, in the matter of installation of common carriers service by water other than through the Panama Canal.

With respect to the answers to Question 36, it is apparent that 36 a, b, d, and e, are largely answered by the fact that Seatrain is now the only common carrier by water operating between the Port of New York and Galveston Bay. In amplification of this I enclose copy of communications directed by various shippers and receivers of freight and by certain public bodies to the United States Maritime Commission which collectively indicate answers to all the subquestions listed under Question 36.

In June and early July of 1941 the Maritime Commission requisitioned the use of two of our steamers then operating in the New York-Havana-New Orleans run, namely, Seatrain "Havana" and Seatrain "New York." This left us with only two vessels eligible to operate coastwise; one of them was, therefore, allocated to the New York-Havana-New Orleans run and the other to the New York-Texas City run, reducing our sailings in both routes from weekly to biweekly. Shortly thereafter it was reported that representatives of the British Government had asked the Maritime Commission to secure for them these remaining two vessels for their use under the Lease-Lend Act. The fact that this request had been made was the occasion for the letters referred to above,

263 all of which were written voluntarily and indicate the importance to their writers of the continuance of this service. The letters are from the following:

Bering Cortes Hardware Company.
New York Association Dealers in Paper Mill Supplies.
American-LaFrance-Foamite Corporation.
American Cranberry Exchange.
American Chain & Cable Company.
Butler Brothers.
Church & Dwight Company, Inc.
Eastern Traffic Bureau, Inc.
Equitable Paper Bag Company, Inc.
Geffen Industries, Inc.
Hoboken Chamber of Commerce.

Houston Milling Company, Inc.
Houston Warehouse & Transfer Association.
Huey & Philip Hardware Company.
Thomas J. Lipton, Inc.
South Texas Cotton Oil Company.
Wickwire Spencer Steel Company.
Wyatt Metal & Boiler Works.
Merchants Association of New York.
International Agricultural Corporation.
Jefferson Lake Sulphur Company.
David J. Joseph Company.
M. W. Kellogg Company.
O'Connor Petroleum Inc.
R. T. Vanderbilt Company.
Dresser Manufacturing Company.
Firestone Tire & Rubber Company.
Carbide & Carbon Chemical Corporation.
Flintkote Company.
Collin County Mill & Elevator Company.
Houston Chamber of Commerce.
Cox Fence Company of Houston.
McAlester Fuel Company Dallas.
Texas City Board of Trade.
Texas City Chamber of Commerce.
Texas City Terminal Railway Company.
American Metal Company, Ltd.
Ruberoid Company.
S. S. Stafford, Inc.
Consolidated Steel Corporation Ltd.
Commercial Metals Co. Ltd.
Certainteed Products Corp.
Burrus Mill & Elevator Company.

Yours very truly,

E. K. MORSE,
Vice President.

EKM:GB.
Enclosure.

264 I, Joseph Hodgson, of Montclair, New Jersey, upon oath, depose and say as follows:

1. That I am Vice President of Seatrain Lines, Inc., and have held that office continuously since the incorporation of the company, and that I am fully familiar with the development of the company and the plans of its management during its entire period of corporate existence.

2. The management of the company has had it in mind to insti-

tute a service between New York Harbor and the Houston-Galveston-Texas City district ever since the original conception of Seatrain, in 1926. At the time of the institution of the New Orleans service (1932) there were available to us via New Orleans rates and routes to a large portion of the State of Texas, including points in Central and South Texas as well as North Texas. However, in 1937, under the decision of the Interstate Commerce Commission in Consolidated Southwestern Cases, Docket No. 13535, the railroads serving the points in Central and South Texas, referred to above, declined any longer to maintain through rates with Seatrain to those points on a parity with the rates available in connection with other steamship lines through the ports of Houston and Galveston, as a result of which most of the traffic to Central and South Texas points referred to was lost to Seatrain until such time as a direct service through Texas ports could be put in.

During the entire period, 1932 until the present, Seatrain has been engaged as petitioner, respondent, or intervener in numerous cases before the Interstate Commerce Commission, some of which were so vital to the successful continuance of Seatrain that plans for expansion had to be held in abeyance pending their outcome one way or the other. Nevertheless, during this entire period the writer, other officers of the company, and others under their direction, were constantly studying the possibility of a direct
265 Texas service. Subsequent to the decision of the Commission in Consolidated Southwestern Cases, referred to above, railroads operating from Galveston, Houston, and Texas City, to points in South and Central Texas, indicated to Seatrain that if Seatrain service were to be extended to that district they would be in position to work with Seatrain in the matter of through routes and rates.

By 1939 the success of Seatrain had been such and the pending litigation had been sufficiently cleared up to justify the management of the Company in making definite plans for the extension of service to Texas and in July of that year contract was entered into with the Sun Shipbuilding & Dry Dock Company of Chester, Pennsylvania, for the construction of two new Seatrains, which were privately financed. Prior to and after that date extensive studies had been made of the Texas traffic situation and conferences were held with representatives, shippers, and receivers of cargo handled between the Atlantic Seaboard and that district. These conferences confirmed our belief that there was a strong demand for Seatrain service in that route.

I cite in particular the testimony before the Commission in Docket No. 25546, Application of the Missouri Pacific Railroad Company and Texas & Pacific Railway Company under Section 5

(19–21) of Interstate Commerce Act in the matter of Installation of Common Carrier Service by Water other than through the Panama Canal, hearings held at Brooklyn, New York, January 9, 10, 11, 1940, and at Galveston, Texas, January 25, 26, 27, 29, and 30, 1940, as follows:

Witness George O. Headen, representing The M. W. Kellogg Company of Jersey City, N. J. Record pages 2087, 2093, 2107, et seq.

266 Witness F. E. Marik, representing American Metal Company, Ltd., New York. Record pages 2108, 2122, et seq.

Witness Arthur C. Schier, General Traffic Manager, General Foods Corporation, New York City. Record pages 2120, 2126, et seq.

Witness Charles S. Davis, Traffic Manager, Standard Tinplate Company and Continental Can Company, Inc., Canonsburg, Pa. Record pages 2137, 2143, et seq.

Witness E. E. Wilson, Manager of Transportation, American Agricultural Chemical Company, New York City. Record pages 2155, 2159, 2170, et seq.

Witness Charles D. Mackee, Traffic Manager, Binney & Smith Company, New York. Record pages 2171, 2174, et seq.

Witness Harold L. Brand, Assistant Traffic Manager, J. M. Huber & Company, New York. Record pages 2189, 2191, 2201, 2219, 2220, et seq.

Witness A. D. Sheffe, Assistant Traffic Manager, Standard Oil Company of New Jersey, New York City. Record pages 2205, 2207, et seq.

Witness William Rose, Traffic Manager, Key Manufacturing Corporation, Brooklyn, New York. Record pages 2231, 2233, et seq.

Witness R. V. Dover, Manager San Antonio Freight Bureau, San Antonio, Texas. Record pages 2581, 2587, 2618, et seq.

Witness Arch G. Campbell, Executive Secretary of the Texas Grain & Feed Dealers Association, Fort Worth, Texas. Record pages 2619, 2623, et seq.

Witness Wallace Green, Traffic Manager, Huey & Philip Hardware Company, Dallas, Texas. Record pages 2675, 2678, 2693, et seq.

267 Witness A. R. Atkinson, representing South Texas Cotton Oil Company and Pancrust Plate Company, Houston, Texas. Record pages 2756, 2762, 2783, 2784, et seq.

Witness E. G. Armer, Traffic Manager, Gordon, Sewell & Company, Houston, Texas. Record pages 2786, 2789, et seq.

Witness L. D. Smith, Traffic Manager, Consolidated Chemical Industries, Houston, Texas. Record pages 2801, 2807, 2824, et seq.

Witness D. R. Simpson, General Traffic Manager, Tex-O-Kan Flour Mills Company and others, Dallas, Texas. Record pages 2825, 2831, et eq.

Witness Henry H. Cate, President, Houston Milling Company, Houston, Texas. Record pages 3368, 3381, 3416, 3417, et seq.

Witness E. V. Rhoades, Chairman Transportation Committee, Texas City Board of Trade, Texas City, Texas. Record pages 3473, 3476, et seq:

With few exceptions these witnesses represented firms to which the service of Seatrain, through the port of Texas City, was expected to be useful and their testimony in general reflects the need of that service and their intention to use it. This intention has in every case been borne out in practice and Seatrain has handled cargo for the firms represented by these witnesses.

As a matter of fact the Commission has itself in numerous proceedings on extensive records so fully investigated the public interest in Seatrain's operations and in the type of transportation service which it affords, and has so definitely found that Seatrain provides a type of transportation which is required by the public interest that its own decisions would seem to afford a controlling precedent here. From the standpoint of the character of the service which Seatrain's facilities and type of vessels make possible and the transportation economies resulting from its method of operation, its service between Texas City and Hoboken is
268 in practically all respects similar to its service between New Orleans and Hoboken and the findings of the Commission as to the public interest in connection with the latter are equally applicable in connection with the former.

In Investigation of Seatrain Lines, Inc., 206 I. C. C. 328, with which were considered the applications of Missouri Pacific and Texas & Pacific under the provisions of the Panama Canal Act to continue to own stock in Seatrain (in connection with which applications a finding as to the public interest in Seatrain's operations was required by the law as it then existed), the Commission found (206 I. C. C. 335):

"Public Interest.—The Seatrain method of transportation was developed for the purpose of eliminating the expenses, disadvantages, and delays incident to the transfer of lading between railroad freight cars and the holds of vessels. By means of the loading machinery described in the original report, loaded freight cars are lifted from the tracks of the connecting railroad at one port, deposited on the Seatrain vessel, which carries them to the port of destination, lifted from the vessel to the tracks of the connecting railroad, and moved to final destinations without having the contents disturbed in any way. The service performed by Seatrain is gen-

erally conceded to be superior to that afforded by steamships of the usual type.

"By using Seatrain service, shippers obtain what is practically equivalent to all-rail service, except for the somewhat longer time in transit, at rates less than the all-rail rates. They are also saved packing and handling expenses necessarily incurred if the movement is over the break-bulk water routes. In addition certain classes of bulk freight which cannot be handled in vessels of the usual type, and which cannot bear the all-rail charges, can be handled by Seatrain, and thus markets opened up for them which theretofore could not be reached.

"Representatives of the Manufacturers Association of Connecticut, the New England Traffic League, the Chambers of Commerce of Boston, Mass., and Fort Worth and Dallas, Texas, the Fort Worth Freight Bureau, and the Southern Pine Association testified that Seatrain service is of advantage to the convenience and commerce of their members. Similar representations were made on behalf of several individual shippers.

269 "*It seems clear from the evidence of record that the operation of Seatrain is in the public interest and is of advantage to the convenience and commerce of the people.*" [Italics ours.]

The question of public interest arose in another way in Docket No. 25727, Seatrain Lines v. Akron, C. & Y. Ry. Co., 226 I. C. C. 7. Numerous railroads, including railroads serving the Southwest, had refused to establish and recognize through routes for through transportation in connection with Seatrain and had refused to establish joint through rates applicable to such through routes. Complaint was therefore brought asking the Commission to order the railroads to recognize and/or establish through routes and to establish reasonable and non-discriminatory joint through rates for rail-water and water-rail-water transportation in connection with Seatrain. The Commission found (226 I. C. C., pp. 20–21):

"Public Interest in Through Routes Between Seatrain and Railroads

"Even if it were held that through routes do not now exist in connection with Seatrain, *the record shows that the establishment of such routes and of joint rates over same would be in the public interest and should be prescribed.* In the report on further hearing in *Investigation of Seatrain Lines, Inc., supra*, we pointed out that the service performed by Seatrain is generally conceded to be superior to that afforded by steamships of the ordinary type; that, by using Seatrain service, shippers obtain what is practically equivalent to all-rail service except for the longer time in transit, and are also saved packing and handling expenses necessarily incurred if the movement is over the break-bulk water routes; that

certain classes of bulk freight which cannot be handled in vessels of the usual type and which cannot bear the all-rail charges can be handled by Seatrain and thus markets opened up which theretofore could not be reached, and that numerous organizations and individual shippers had testified that the service was of advantage to them. We there found that the operation of Seatrain was in the public interest. Numerous additional representations to the same effect have been made on this record.

270 *"The facts recited, upon which we concluded that the operation of Seatrain was in the public interest, also warrant the conclusion that through routes and joint rates over Seatrain and its rail connections in trunk-line and New England territories and the Southwest and that portion of southern territory here involved would also be in the public interest.*

Shippers and receivers of freight at interior points can secure the full advantage of the superior service of Seatrain only by the establishment of through routes and joint rates.

"Defendants contend that the all-rail routes and the routes in connection with the break-bulk water lines are more than sufficient to handle all available traffic and that, accordingly, the public interest does not require the establishment of additional through routes in connection with Seatrain. Unquestionably defendants have physical facilities sufficient to handle over the all-rail routes all available traffic, but all of the traffic does not so move, primarily because in many instances the all-rail rates are too high to permit of such movement. *Undoubtedly the break-bulk lines could also handle all of the traffic now moving over all of the water routes, but that is not a sufficient reason for depriving Seatrain of an opportunity to participate in the traffic under appropriate rates or for depriving the public of the admittedly superior service afforded by Seatrain.*" [Italics added.]

Attention is directed to the fact that the Commission here found that regardless of the existence of a sufficient number of other water carriers operating in the trade to handle the traffic, the public interest required the establishment of through routes via Seatrain in view of the nature of the through transportation service made possible by Seatrain's type of vessels and operations. At page 34 of the same report, the Commission again found:

"2. That the public interest requires the establishment and maintenance of through routes and joint rates in connection with Seatrain between that portion of official territory covered by the findings in the twenty-third and twenty-fifth supplemental reports in Consolidated Southwestern Cases, on the one hand, and southwestern territory and that portion of southern territory hereinbefore described, on the other hand."

This decision involved also the refusal of certain railroads to permit the interchange of their cars with Seatrain in the performance of through transportation. Obviously, the Commission
271 could not order the railroads to permit their cars to be used for through transportation via Seatrain unless this was a necessary part of the furnishing of reasonable facilities for the operation of through routes required by the public interest. On this point the Commission found (p. 29):

"We have here found that in certain instances through routes between Seatrain and defendants now exist, and that, in those and other instances, *the establishment and maintenance of through routes and joint rates are necessary in the public interest.* The record here shows that the reasonable and appropriate method of interchanging traffic moving over such routes is and will be by the interchange of the loaded cars. If defendants parties to the through routes and joint rates herein prescribed refuse to so interchange, with Seatrain, traffic moving over such through routes, the matter may be brought to our attention either by a request for reopening Nos. 25728 and 25878, the complaints of the Hoboken Manufacturers' and Lower Coast referred to above, or by a new complaint." [Italics added.]

Plainly Seatrain cannot provide a means for affording through rail and water transportation of the character which the Commission thus finds in the public interest unless it operates as a water carrier.

In the case last cited there was a further hearing on the question of the level of the joint through rates to be established in connection with the through routes via Seatrain. It was contended by Seatrain's opponents, including the break-bulk steamship lines operating between Gulf and North Atlantic ports that in view of the superiority of the type of service afforded by Seatrain, which they not only conceded but stressed, the joint rates via Seatrain should be prescribed on a higher level than joint rates via the break-bulk lines. For Seatrain and various shippers, however, it was contended that although Seatrain's type of
272 service was superior, it involved substantially less costs to the carrier and therefore the public was entitled to be given the benefit of the savings in costs in the form of rates no higher than the break-bulk rates. In its decision on further hearing, 243 I. C. C. 198, the Commission upheld Seatrain's contention. At page 211 of its report the Commission said:

"We may safely conclude from the cost evidence that the Seatrain unit costs are no greater than the break-bulk lines and probably are materially less."

The Commission dismissed the contention that Seatrain should be required to charge higher rates in order to protect the break-bulk lines from Seatrain's competition, saying (p. 215):

"The result would also be to deprive shippers of much of the benefit of an improvement in service which has been accomplished without increase in the cost thereof, the purpose of such deprivation being to protect the carriers which continue to offer the old and inferior service. That such a result will diminish, if not remove, the incentive for making such improvements seem clear."

As has been stated from the standpoint of the character of the service it provides, its methods of operation and its costs, Seatrain's operations between Texas City and Hoboken have the same characteristics as its operations between New Orleans and Hoboken. When many of the railroads refused to participate with Seatrain in joint through rates in connection with its Texas City service, just as they had done in connection with its New Orleans service, Seatrain was compelled to file another complaint with the Commission in Docket No. 28437 similar to its complaint in the foregoing proceeding, asking the Commission to require the railroads to join with it in the maintenance of through
273 routes and the establishment of just, reasonable and non-discriminatory joint through rates via Texas City. Following the Commission's decision in Docket No. 25727 negotiations are in hand for a settlement of this new complaint by the establishment of joint through rates and the Chairman of the Commission has been kept advised and has encouraged these negotiations for voluntary settlement that are based upon the premise that the circumstances would require substantially the same decision in connection with transportation via Texas City as the decision rendered in Docket No. 25727 in connection with Seatrain's operations via New Orleans.

Joseph Hodgson.
JOSEPH HODGSON.

STATE OF NEW YORK,
County of New York, ss:

Before me, a notary public in and for the County of New York personally appeared Joseph Hodgson, to me known and known to be the person who signed the foregoing statement, and being duly sworn, deposed and said that the statements therein contained are true to the best of his knowledge, information and belief.

BLANCHE C. WELCH,
Notary Public.

New York County Clerk's No. 103; New York County Register's No. 3W.
Term Expires March 30, 1943.

NIGHT LETTER

HOUSTON, TEXAS, *July 16, 1941.*

CHAIRMAN OF U. S. MARITIME COMMISSION,
Washington, D. C.

Elimination of Seatrain service to Texas would adversely effect defense work now under progress and would add a heavy burden to the consuming public. Keep these boats in service.

BERING CORTES HDW. COMPANY.

AHS: GJJ.
Cy: E. E. Jackson.

NIGHT LETTER

JULY 15, 1941.

CHAIRMAN U. S. MARITIME COMMISSION,
Washington, D. C.

This association has learned that the Government contemplates taking over the Seatrain Lines steamers. This service is largely used by the waste material industry who are trying to conserve waste material of the nation in this emergency. This service is vitally necessary to us. If not inconsistent we urge you to do everything possible to allow this service to remain in effect. It means much to us.

NEW YORK ASSOCIATION OF DEALERS IN
PAPER MILLS SUPPLIES,
30 Main Street, Brooklyn, New York.

ELMIRA NEW YORK, *July 18, 1941.*

Understand unofficially that it is contemplated taking the two remaining Seatrain vessels out of service for domestic shippers thus depriving eastern seaboard of very necessary water service to Texas particularly the types of vessel which does not require breaking bulk. Urgently suggest boats be left in coastwise trade to Texas.

AMERICAN-LAFRANCE-FOAMITE CORPORATION,
J. J. DELANEY, *Traffic Manager.*

JJD: FL.
5:00 PM.

274 AMERICAN CRANBERRY EXCHANGE

NEW YORK, N. Y.

JULY 17, 1941.

Admiral E. S. LAND,
Chairman, U. S. Maritime Commission,
Washington, D. C.

DEAR SIR: We have been using the Seatrain Lines, Inc., for car-

load shipments of our cranberries to New Orleans for the past seven or eight years and last year we were able to secure the advantage of this excellent service for our shipments to Houston, Texas.

We had been in hopes of getting additional service the coming year, but we now understand that two of their boats have been taken over by the Navy, the reasons for which were apparently well grounded, but we have only recently heard a rumor that there are prospects of more of their boats being taken over for the use of the British Navy.

Please understand that we have no reason to object to any of these boats, or any other boats, being taken out of the regular service if it is for the best interests in the defense of our country that they be taken out of their regular service. The purpose of this letter, however, is to point out to you our extreme desire that at least a portion of this very valuable service to us as shippers of a perishable food commodity be continued if such is possible.

Very truly yours,

AMERICAN CRANBERRY EXCHANGE,
Asst. General Manager.

CMC:L.

275 AMERICAN CHAIN DIVISION

JULY 16, 1941.

MARITIME COMMISSION,
Washington, D. C.

GENTLEMEN: We note with alarm that more and more coastwise steamers are being taken by the Commission.

As a result, this reduction in shipping facilities to Cuba, South America and the Gulf ports is creating quite a handicap in making delivery of necessary materials for Defense purposes.

The Navy Department have recently requisitioned, under lease, two of the five boats owned by the Seatrain Lines, Inc., which has interfered, to a large extent, in the transportation of freight to Cuba, New Orleans and Texas City.

These boats handle freight faster than any other type of boat in the coastwise trade and it is our understanding that the British Commission are now making an effort to secure two of the three boats left. We need these boats in carrying our materials to the southwest for Defense purpose, and also in taking care of our relations with our Cuban customers, and certainly, we would regret very much seeing these boats taken off their regular run.

The railroads running into southwestern territory at the present time have all they can handle and if the tonnage going on the Seatrain Lines were thrown onto the roads, it would mean considerable delay in arrival at destination and delay in building up the Defense units for which our material is shipped.

We especially request that you do not interfere with the facilities that are available for this purpose any more than necessary. We believe that keeping these boats on their regular run is most essential.

Very truly yours,

WILLIAM T. MORRIS,
President.

WTM.CJG.
cc: R. B. Stuart.

276 BUTLER BROTHERS

DALLAS, TEXAS, *July 16, 1941*

THE HONORABLE EMORY S. LAND,
Chairman, U. S. Maritime Commission, Washington, D. C.

DEAR MR. LAND: Our attention has been called to the fact that your Commission is investigating the possibility of taking over the two remaining ships of the Seatrain Lines handling coastwise consignments.

It is our request that due consideration be given this proposition owing to the fact that these Seatrain boats are not ordinary regulation steamship boats. We do not believe that the British government can handle steamships of this construction; and they certainly would be of great benefit to shippers of this vicinity—enabling them to have some means of coastwise traffic—as all other lines using the ordinary steamships have already been taken over by the Commission. Otherwise, this would leave Texas without any means of coastwise traffic.

We have not protested any movement on behalf of the Maritime Commission in requisitioning regular construction steamships, such as Morgan, Southern, Pan-Atlantic, etc., but now we do ask you to give this petition due consideration as we feel that it has its merits.

Yours very truly,

——— ———, *Operating Manager.*

C. E. Hinds/ew.
(Blind cc to H. D. Fry, Dallas.)

277 JULY 17, 1941.

Admiral EMORY S. LAND,
% U. S. Maritime Commission, Washington, D. C.

DEAR SIR: We have just learned that there is a possibility of the two remaining ships of the Seatrain Lines being taken over, as were their other vessels.

We are very large shippers, by the water routes, of Baking Soda (Bicarbonate of Soda) which comes under the classification of "Food Stuffs," to the Southwest, and particularly to the State of Texas.

We are already experiencing difficulty in obtaining shipping permits from the steamship lines due to the Morgan Line being out of business entirely, and the other Gulf lines, including the Seatrain Line, having only about half the sailings they formally had.

We hope, therefore, that the Seatrain Lines will be allowed to continue to serve the Shipping Public, as they are now doing.

Yours truly,

CHURCH & DWIGHT CO., INC.,
(Signed) JOHN DETWEILER,
Traffic Manager.

JD/MB.

278 JULY 16, 1941.

Admiral E. S. LAMB,
Chairman United States Maritime Commission,
Washington, D. C.

DEAR ADMIRAL LAMB: The Eastern Traffic Bureau, Inc., represents as the individual traffic manager fourteen large manufacturers of chocolate products and candy and confectionery, and move considerable of its cocoa powder from some of our chocolate plants to the Government for use in Army Training Camps.

I learn this morning that you are considering withdrawing more of Seatrain Line ships. I am sure that you realize the importance of these ships to the American business interests and would not permit those interests to be deprived of transportation or forced into the use of all rail lines at great expense. As we move one or two carloads on every sailing into Texas, we are appealing to you to allow the Seatrain Line to remain in service.

We have in the past been greatly handicapped also, due to withdrawal of Intercoastal ships and other coastwise lines, and are hopeful that we will not be further inconvenienced in that direction.

Of course, you do understand that when our differential lines are taken from us we are forced to use all rail and this of necessity causes a greater cost for transportation, and we want to avoid in every way possible increase of prices to our trade.

Very truly yours,

EASTERN TRAFFIC BUREAU, INC.,
(Signed) WM R. MOORE, *President,*

WRM/O.

279 HWP 9 TWS LONG ISLAND CITY, N. Y., *July 16.*

Admiral E. S. LAND,
Chairman U. S. Maritime Commission, Washington, D. C.

We earnestly implore you to reconsider any contemplated action to further diminish the number of vessels now remaining in our

coastwise service. We operate a paper mill in Texas in conjunction with a converting plant here in New York and the complete disappearance of water service can conceivably result in the ultimate closing of our mill and a considerable curtailment of employment in our converting plant.

F. C. Losen,
Traffic Manager,
Equitable Paper Bag Co., Inc.

280 July 17th, 1941.

Rear Admiral Emory S. Land,
Chairman U. S. Maritime Commission, Washington, D. C.

Dear Sir: It has just come to our attention that your commission intends to request of Seatrain the Surrender of their remaining vessels now in coastwise service.

We are large manufacturers of wines, which products we ship to numerous customers in Texas and Louisiana who would be greatly effected by the enactment of your contemplated move.

May we take the liberty of earnestly requesting your reconsideration of such a move in view of the fact that this act would be practically disastrous to our business in the Southwest area.

Until recently there were several steamship companies transporting freight from New York to the Southwest; however, the boats of these concerns (including the Morgan Steamship Line) were purchased by your commission, forcing these concerns to suspend operations. The situation has been growing increasingly difficult, however we were able to continue our business in Texas and Louisiana only because of Seatrain's service. Should you purchase Seatrain's boats and in turn force them to suspend operations it would be greatly detrimental to our business.

We respectfully repeat our request therefore that you reconsider the action to be taken regarding the purchase of Seatrain's remaining vessels.

Very truly yours,

Geffen Industries, Inc.
Robert J. Meenan

RJM: ss.

281 Hoboken Chamber of Commerce

Hoboken, New Jersey

July 17, 1941.

Rear Admiral Emory S. Land,
Chairman, United States Maritime Commission,
Washington, D. C.

Dear Admiral Land: In accordance with our telegram dated July 16th, I propose to set forth herewith certain facts relative to the Seatrain matter.

As we understand it, the British Government has made inquiry for the remaining vessels of this Line—two ships having already been requisitioned by our own Government. The Terminal of the Line, as you may know, is here in Hoboken and the possibility that it may have to go out of business disturbs us greatly.

One of the major problems we will necessarily face in this connection is the discontinuance of service over the Hoboken Manufacturers Railroad—a subsidiary of Seatrain. The railroad has for years been in the red—about $100,000 annually—despite the fact that 76% of the freight over the Line is Seatrain freight. It is quite apparent that with this business lost, the railroad could not possibly survive nor would any one attempt its operation under such a serious handicap. Obviously, with Seatrain out of the picture and with the railroad consequently discontinued, the industries, manufacturers, and steamship lines presently served by the railroad will be faced with a serious transportation problem that in most cases will defy solution. Many of these firms are engaged in defense work which would certainly be delayed at a time when speed is so essential. Furthermore, we believe a number of the industries could not continue in business here without the railroad service. They would be forced to move their operations out of Hoboken. The Maritime Commission's Hoboken terminal, incident'ly, will also be affected, it being located on the southern end of the railroad. The impact that all of this would have upon our national defense efforts, as well as upon our own community and on the State of New Jersey, is glaringly evident.

There is also the matter of some 180 employees of the Railroad Company and the Line that will be out of jobs if the transfer is approved. Of these men, 75 live in Hoboken, and as railroad men they will probably find it necessary to move elsewhere in order to secure employment. We doubt that very many of them could adapt themselves to other lines. The resultant loss to our residential property owners and to our merchants would be a serious blow.

Frankly, a burden of this character will be highly disastrous and certainly it is an unwarranted load on a community that has already carried a burden far in excess of its ability to do so.

We are developing additional facts to send you and sincerely hope that no action is taken until all the available information is on hand and every one affected heard from.

Very truly yours,

(Signed) OGDEN H. HAMMOND,
President.

282 July 15, 1941

Mr. CHAS. B. BOWLING,
Chief Transportation Division,
United States Department of Agriculture,
Surplus Marketing Administration, Washington, D. C.
Attention Mr. J. C. Winter.

For your guidance we were just informed that Seatrain service from Gulf ports to eastern seaboard which was very inadequate, but as you know the only outlet for our farm products, is going to be discontinued. We have urged the Maritime Commission to leave this service intact stressing the necessity of outlet for flour, rice, citrus fruits, and other products from Texas. Would it not be possible in this connection to use your good offices to restrain Maritime Committee from discontinuing service, at the same time opening the subject for discussion on Memphis gateway to the east. We will appreciate your efforts.

HOUSTON MILLING COMPANY, INC.

283 HOUSTON, TEXAS, *July 16, 1941.*

Admiral EMORY S. LAND,
Chairman, U. S. Maritime Commission, Washington, D. C.

We are informed you are giving consideration to turning over for British use under lease lend act, Seatrains Texas and New Jersey now in Atlantic coastwise service between Hoboken and Texas City. Houston's important position as distribution center is based almost entirely on its coastwise steamer service. Further curtailment this service will destroy its very existence as distribution center, causing irreparable injury to business generally and will jeopardize enormous investments in warehouse facilities here which have been built solely on the strength of the coastwise service. Moreover defense industries being constructed and operated in this area have without question based their operation upon availability of coastwise transportation and we believe this important defense activity should be protected. In view of these facts, we strongly urge you to leave the two Seatrains in present service and to make every possible effort to allocate to coastwise service between eastern ports and port of Houston, other steamers to replace those already withdrawn.

HOUSTON WAREHOUSE & TRANSFER ASSN.
L. L. SCHWECKE, *President.*

Day letter paid.
Charge Universal Terminal Whse. Co.

284 HUEY AND PHILP HARDWARE COMPANY

1900 GRIFFIN STREET

DALLAS, TEXAS, *July 20, 1941.*

Mr. EMORY S. LAND,
Chairman U. S. Maritime Commission,
Washington, D. C.

DEAR MR. LAND: Information has just reached me from a source I consider reliable that it is the plan of your commission to requisition for British use under the Lend-Lease Act the two remaining Seatrain vessels known as Seatrain Texas City and Seatrain New Jersey.

As you realize, no doubt, this operation of Seatrain is the only connection that the State of Texas has via water with the port of New York.

With the requisitioning of other steamship lines and vessels that has already taken place, we and other merchants in the interior of Texas who are handling quite a bit of Defense material are already seriously handicapped by the depletion of the former service. Further reduction in coastwise shipping will seriously handicap all forms of industry dependent upon water transportation. Further reduction will forestall any contemplated expansion of private industry and will result in a much greater loss than we are already experiencing to those of us who have already committed ourselves on sales contracts based on Seatrain service. The elimination of Seatrain service will increase many times the cost of transporting Defense materials from one part of our nation to another, and with ever increasing Defense cost, it would seem well to consider such savings as might be had through the uninterrupted, efficient and economical transportation now rendered by Seatrain.

It is particularly felt that the Seatrain boats would not be fitted for British service without the expenditure of large sums to place them in a condition for this service, and while we all realize that this is a moment of national emergency, and we each and everyone feel that we should do our part, it would seem more wise to us that should it become necessary to absolutely deplete all coastwise service to Texas ports, that the Seatrain vessels would be of more value to our Navy than to the use of the British
285 Government. This is already born out by the fact that two boats of the Seatrain Line have been taken and will be placed in service with our Naval forces.

With the full realization of the present difficulties with which

our country is confronted, we trust that you will give serious consideration to allowing the operation of Seatrain vessels to continue in coastwise service or at least until such time as they may be required for our own Naval needs.

Yours very truly,

(Signed) WALLACE GREEN,
Traffic Manager.

WG; rec.
cc. Mr. H. D. Fry, G. S. W. F. A., Seatrain Lines, Dallas, Texas.

286 JULY 16, 1941.

Honorable EMORY S. LAND, *Rear Admiral,*
Chairman, U. S. Maritime Commission,
Washington, D. C.

SIR: In our present day National Emergency, we as Americans, are willing, and daily striving to aid our defense program. In this connection we are faced with new and complex transportation problems, due, as you know, to the fact that several sailings have been discontinued, which are not favorable to us as shippers.

Recently two steamers of "Seatrain, Inc.," were taken over by your commission and we have been forced to find other means of transportation so inimical to our shipping costs that it has reflected in an increase in transportation costs of approximately seventy percent. We have, however, been using the Seatrain Service whenever we can obtain bookings, which is of material value to us.

On shipments to the Southwestern area comprising the greater part of the States of Texas and Oklahoma, we have relied on great bulk distribution at the port of Houston, Texas. To further curtail this service would mean a greater hardship upon ourselves and other shippers. As you undoubtedly know, the "Seatrain" is the only available water method left to shippers in this area. It would mean we would have no other alternative other than 'all rail' which costs would prove prohibitive.

On behalf of my employer, I request of you to give thought to the possibility of further curtailment of this service, consistent with our National Defense Program, trusting in your judgment you will recognize the important part "Seatrain" is playing in our everyday industrial life.

Respectfully yours,

THOMAS J. LIPTON, INC.,
E. BENTON FEHR,
Asst. Traffic Manager.

EBF/mm.

287 JULY 16, 1941.

To Admiral EMORY S. LAND,
Chairman, U. S. Maritime Commission,
Washington, D. C.

Our information Seatrain coastwise ships possibly being requisitioned for other services. At present time, Seatrain Lines only transportation facility available to us, as well as other Gulf-coast shippers, for New York shipments. Any interruption present service would mean relinquishing markets which we are now serving through the port of New York. Sincerely trust your commission will find ways and means, continue present service.

SOUTH TEXAS COTTON OIL CO.

cc: Mr. Barnett, New Orleans, La.

288 JULY 16, 1941.

Rear Admiral EMORY S. LAND,
Chairman, Maritime Commission, Washington, D. C.

MY DEAR ADMIRAL: With the keenest interest I keep informed of the activity of your Committee in its tremendous program, and have repeatedly stated that if all governmental bureaus operated as intelligently and efficiently as yours, it would be a great satisfaction.

The sharp reduction in vessels in the Pacific Coast, Gulf, and Coastwise services has compelled a drastic readjustment of our company's sales and distribution program. Certain Pacific Coast business that formerly moved Intercoastal Lines now cannot do so because of vessel space, and it cannot move All-Rail because of freight rates, causing us to forego the market. While this is, of course, a serious matter to an industry, we realize it is secondary in importance to the great National Defense Program.

Please refer particularly to the Gulf trade, where the service has already been severely reduced. The Morgan Line has been entirely eliminated: the Seatrain, Southern Steamship, and Pan Atlantic services have been much reduced, and I believe a still further reduction is contemplated as threatening to eliminate the Seatrain service from New York—leaving no service from that port.

289 With the Morgan Line out of the picture, I very much hope that the Seatrain service can be retained—even if in a skeleton form—so will have some service from New York, and I just want you to know it is a very valuable service to the In-

dustry in this territory, from which so much tonnage for the Defense Program is produced and shipped.

Yours truly,

WICKWIRE SPENCER STEEL COMPANY,
HARRY H. MARSALES,
General Traffic Manager.

HHM: BL.

290 WYATT METAL & BOILER WORKS
HOUSTON, TEXAS

JULY 16, 1941.

Admiral LAND,
Chairman U. S. Maritime Commission, Washington, D. C.

DEAR MR. CHAIRMAN: Attached hereto you will find confirmation of our night letter of July 15 pertaining to the removal of Seatrain Boats, New Jersey and Texas, from the coastwise service.

We would greatly appreciate your giving very careful consideration to retaining these two boats in the coastwise service.

Yours very truly,

WYATT METAL & BOILER WORKS,
By C. L. WILLIAMS, *Manager,*
Purchasing & Traffic Dept.

CLW: HH
Attach.
cc—Seatrain Lines, Inc., Commerce Building, Houston, Texas.

291 HOUSTON, TEXAS, *July 15, 1941.*

Admiral LAND,
Chairman U. S. Maritime Commission, Washington, D. C.

We understand consideration being given to taking over Seatrains boats New Jersey and Texas. Discontinuace of Seatrain service will increase cost substantially all basic materials entering into defense in this territory and entail additional burden on rail transportation unless other ocean service afforded.

WYATT METAL & BOILER WORKS.
C. L. WILLIAMS.

CLW/hh.

292 JULY 17, 1941.

Admiral EMORY S. LAND:

Rumors have reached us that you are contemplating taking over two of the remaining vessels of the Seatrain fleet for National Defense or Aid to Britain. Such action would be highly detrimental to the commerce of a large part of the country and would cause irreparable injury to many of our members.

Since the withdrawal of the Clyde Line and Morgan Line service between New York and Gulf ports, practically the only remaining water service has been maintained by Seatrain Lines. Two of its vessels already having been taken over by the Government, its service necessarily has been curtailed. Accordingly it has become of increasing necessity to shippers in this territory.

Many of our shippers are obliged to rely entirely upon water service because commercial competition makes it impossible for their goods to bear the higher rail transportation charges to the Southwest. If the remaining vessels in the Seatrain fleet are taken by the Federal Government, New York will be left with no water service to the Gulf except the weekly sailing of the Pan-Atlantic Line. That would result in the loss of the Southwestern markets to many Eastern shippers who have spent years and considerable money in developing that trade.

It is our urgent request and hope that the remaining vessels in the New York-Gulf trade will be permitted to continue to serve our shippers, and that a complete blackout of water service in this important run will not become necessary. Any expression which the circumstances permit you to make will be welcome.

MERCHANTS ASSOCIATION OF NEW YORK.
———, ———, *Secretary.*

293 INTERNATIONAL AGRICULTURAL CORP.

61 BROADWAY

NEW YORK, *July 16, 1941.*

In re. Potash Salts for Shipment via Seatrain Lines

Rear Admiral EMORY S. LAND,
Chairman, U. S. Maritime Commission, Washington, D. C.

DEAR SIR: As the records of the Maritime Commission will indicate, the Seatrain Lines had in operation four vessels and we are advised that two of these have been requisitioned by the Commission and there is a possibility of the other two being requisitioned.

May we take the liberty of calling to your attention the importance to Agriculture in continuing the remaining two vessels in operation from the Texas Ports to the Atlantic Ports?

This Corporation, through its subsidiary, Union Potash & Chemical Company in Carlsbad, New Mexico, has been and had contemplated moving substantial quantities of Potash Salts by Seatrain Lines. This is an economical and a satisfactory service.

We believe the capacity of these ships is 100 cars and our Mine alone would require at least space for 15 cars per trip. With the number of trips reduced, we would require 30 cars per trip for next year, however this has been reduced to 5 cars per trip by the Seatrain Lines.

For your information, would say that Potash is used almost exclusively in Agriculture and it is absolutely essential to growing of crops. Potash is mixed with Superphosphate and Nitrogen to produce Fertilizer.

May we suggest that the Commission give very careful consideration to the transportation facilities before the two remaining ships of the Seatrain Lines are requisitioned?

As the National Fertilizer Association has headquarters in Washington and has complete information as to the needs of Agriculture, we are taking the liberty of sending copy of this letter to Mr. C. J. Brand, its Executive Secretary and Treasurer, who, we are sure, will be glad to furnish you any detailed information that you may require.

As you are no doubt aware, Potash Salts and all Fertilizer materials are required for seasonal use and they must be
294 delivered to the Farms in advance of the planting season—otherwise the growing crops will not receive the benefit of the Fertilizer.

Please be assured that this Corporation and its affiliates and personnel has every desire to cooperate with the Government in the Defense Program; however, we feel that we should call to your attention the importance of Agriculture in this Program.

Respectfully,

(Signed) J. H. HUNT, *Secretary.*

JHH:Q.

Enclosure: Q.

Please address reply to: 20 North Wacker Drive, Chicago, Illinois.

cc: Mr. Charles J. Brand, Exec. Secy. & Treas., The National Fertilizer Association, 616 Investment Bldg., Washington, D. C.

295 JEFFERSON LAKE SULPHUR COMPANY, INC.

JULY 18, 1941.

Hon. E. L. LAND,
Chairman, Maritime Commission, Washington, D. C.

DEAR SIR: We have heard that there is a likelihood of the two remaining Seatrain vessels being taken from their present service, i. e., from Texas City and New Orleans to Hoboken, and would ask that you consider allowing these two vessels to continue operating in this service, if this can be done without handicapping in any way the Defense Program.

We are miners and producers of Crude Sulphur with Mines located at Clemens, Brazoria County, Texas, and supply Crude Sulphur to manufacturers in Pennsylvania, Ohio, and West Virginia, on whom the removal of the Seatrain service would work hardship.

Therefore, if it is at all possible, we earnestly request that you give consideration to allowing this service to continue to operate.

Yours very truly,

JEFFERSON LAKE SULPHUR COMPANY, INC.

———— ————, *Traffic Manager.*

JDC/GD,
bc to: Seatrain Lines, Inc., Whitney Bldg., New Orleans, La.

296 CHAIRMAN OF THE UNITED STATES MARITIME COMMISSION,
Washington, D. C.

Understand proposal under way to requisition for British Government two remaining Seatrain vessels, thus eliminating their coastwise operations entirely. This action would force our cancellation of definite commitments on special grade of scrap iron which restricted to Seatrain routing, would also drastically affect outlet for future accumulations this material, thus seriously effecting our business. We therefore appeal for your dissenting vote to this proposal.

THE DAVID J. JOSEPH CO.

Charge: The D. J. J. Co.

297 225 BROADWAY, NEW YORK, N. Y.
July 16 1941.

Rear Admiral EMORY S. LAND,
Chairman of the United States Maritime Commission,
Washington, D. C.

DEAR SIR: It is our understanding that the Maritime Commission have requisitioned from the Seatrain Line the ships "Seatrain New York" and "Seatrain Havana" which, as we understand it,

reduces the fleet of the Seatrain Line to two boats, and there appears to be under consideration a further requisitioning of their facilities with, from our point of view, the startling prospect that all of their boats would be diverted from their present occupations.

This Company feels it a strong duty to call to your attention certain facts which we believe vital to the National Defense Program, and which involve this Company and the Seatrain operations. Due to the fact that the Seatrain Lines are in possession of such heavy lifting equipment, it has been possible for this Company to design and erect pressure vessels for essential munition manufacture that otherwise could not be constructed, fabricated and erected, because of the size being so large and the weight so great the the Railroads would not transport them from the point of manufacture in Jersey City to the site of erection, usually in the Gulf Coast area.

We draw this particularly to your attention, as, without the facilities of the Seatrain Line, the development of the Toluene Plant for the manufacture of toluene from crude petroleum now under way at the Baytown Ordnance Works in Baytown, Texas, could not have been possible in its present size. This is also true of the Hydroforming Unit for the Pan American Oil and Refining Corporation in Texas City, Texas which is capable of being con-
298 verted into a toluene manufacturing plant. We also understand that the Government has under consideration six more toluene plants, their size and location being unknown at the present time.

We are submitting here a few photographs of the type of equipment that the Seatrain Corporation have handled for us.

Of course, as we have stated, we do not have railroad clearances for a great deal of this equipment and it is necessary for us to tow in the water, as is, from Texas City or New Orleans, to destination; but, we can do this very readily through the Intercoastal Canal along the Gulf Coast and across Galveston Bay, and you can readily appreciate they are not very desirable tows for outside towing.

These are about the only ships that are now left in New York Gulf Service, as the majority of the other Lines have withdrawn to either more lucrative trade or their ships have been requisitioned by the Maritime Commission; therefore, it is of vital importance that these ships be maintained in their present trade if at all possible to do so. Their service has been regular and it has been excellent; and, as we have stated, it has been of great importance to us and there is no question but what they have been an advancement in Maritime Service in this country, and they have made

possible the handling of large and heavy equipment that heretofor has been unable to move via the regular line steamers or via all rail.

Yours very truly,

THE M. W. KELLOGG COMPANY,
Traffic & Expediting Dept.

(Signed) GEORGE O. HEADEN,
Traffic Manager.

299 JULY 16, 1941.

Comm. H. L. VICKERY,
Maritime Commission, U. S. Commerce Bldg.,
Washington, D. C.

DEAR SIR: We have been notified by the Seatrain Lines, Inc., of New York, that there is a possibility of the remaining two American flag vessels operated by the above company being acquired by the Federal authorities for transfer to Great Britain. It is our belief that these vessels are indispensable in the service in which they are now employed.

When these vessels were launched last year, we arranged with the Seatrain to use the side tanks on both the "Texas" and "New Jersey" for the transportation of petroleum between Texas City, Texas, and Hoboken, New Jersey. The carrying capacity of these vessels was approximately 400,000 barrels per year. When the shipping emergency arose, we arranged with Seatrain to increase the carrying capacity of these vessels to 21,000 barrels by putting into service the double bottoms previously used only for ballast water. As these ships turn around 26 times a year, the two vessels gave us a carrying capacity of 1,090,000 barrels up the coast, equivalent to putting in service a 60,000 barrel tanker.

Our original operation was from Texas City to Hoboken, but after the Navy acquired title to two of their vessels last month, which were previously in service between Belle Chasse, Louisiana, and Hoboken, the "New Jersey" was placed in service out of Belle Chasse. Owing to the distance from refineries in that area and to the fact that we had to handle between 10,000 and 11,000 barrels of ballast water, on the arrival of the vessels prior to the loading of oil, it became necessary for us to construct a storage terminal on property adjacent to the Seatrain docks. We have already acquired this property and let contracts for the construction of the plant at a cost of approximately $35,000 to $40,000.

We are supplying this oil to independent jobbers operating between Perth Amboy, New Jersey, and New London, Connecticut,

who are depending upon us to supply them with the same amount of material this year as we have previously furnished them with. They are currently unable to replace us with another source of supply.

We have had on our books for some time the accounts of the United States Metals Refining Company at Carteret, New Jersey, and the International Nickel Company at Bayonne, whose requirements run approximately 100,000 barrels per year of low sulphur industrial fuel. We arranged with the Royal Petroleum
300 Corp. of New York for these companies, supply, provided we furnish Royal Petroleum with a quantity of number 2 heating oil. It is questionable whether they could continue this arrangement owing to the fact that they will need the space presently used for the carrying of this industrial fuel for the transportation of light oil for their own use.

We would like to point out that the Seatrain operation probably represents the most efficient means of shipping general cargo between the American Gulf and the East. They are capable of carrying 100 tank or boxcars up and down the coast, which in round numbers means that these vessels can handle 12,000 tons of cargo North and South bound in 14 days, plus the 21,000 barrels of oil in their double and side tanks. It is noteworthy that they can handle their loading and unloading in 21 hours in port.

Another factor that we believe should be taken into consideration is that these vessels are touching Havana, Cuba, and offer rapid transportation both to and from that island to New Orleans, Texas City and Hoboken.

On the arrival of these vessels in New York, we discharge the oil directly into barges at the Seatrain dock at Hoboken and distribute it directly to our jobber accounts, thereby freeing approximately 1,000,000 barrels of tank space over the year, at New York Harbor deep water terminals.

The writer does not believe that it will be possible to replace the valuable service of these vessels with less than four carriers of like size.

As stated above, we have let contracts and are currently engaged in work creating facilities for the loading of the Seatrain vessels which involves an expenditure of approximately $40,000. If the Seatrain vessels are to be taken out of service, this investment will be entirely fruitless and the facilities created of no practical use thereafter.

There is still time, however, for us to cancel some of our commitments for this new terminal and save ourselves considerable portion of our loss. If the Seatrain vessels are to be taken from

their present operators, we would appreciate as early an advise as possible so that we may regulate our affairs accordingly.

Thanking you, we are

Yours very truly,

O'CONNOR PETROLEUM, INC.
F. M. O'CONNOR, *President.*

FMO:mho.

301 JULY 16, 1941.

CHAIRMAN MARITIME COMMISSION,
Washington, D. C.

Comes to our attention that there is a possibility two additional Seatrain vessels may be taken over for British Government use, leaving but one vessel in commercial service. We have shipped four cars carbon black per week regularly north-bound. New Orleans to New York or approximately 8% of weekly tonnage for New York. Black is used for rubber tires and other rubber defense orders. Cessation Seatrain service necessitates all rail movement and delays should car shortage develop. Respectfully urge you permit continuance of this service in defense interests of this country rather than deprive New York, New Orleans, and Southwest of the one remaining efficient water link.

R. T. VANDERBILT CO., INC.,
Traffic Mgr.

302 S. R. DRESSER MFG. CO.

JULY 18, 1941.

MARITIME COMMISSION,
Washington, D. C.

Understand remaining Seatrain ships may be taken under lease-lend program. Present shipments to Houston of Dresser quick hook-up pipe connections for oil-field wells and lines now crippled by present reduction in Seatrain schedule. Complete elimination of Seatrain would seriously hamper availability of this standard connection in Southwest. Urge retention of present Seatrain ships in service if at all possible.

DRESSER MANUFACTURING COMPANY.
O. M. ANDERSON.

WU.
9:50
ms.
Cc: Seatrain Lines Inc., New York City.

303 THE FIRESTONE TIRE & RUBBER COMPANY.

AKRON, OHIO, *July 17, 1941.*

Admiral EMORY S. LAND,
Chairman, United States Maritime Commission,
Washington, D. C.

DEAR SIR: We have heard strong rumors to the effect that Seatrain Lines' remaining two boats are under consideration for withdrawal from service between New York and Cuba and the Gulf for use by Great Britain under the Land-Lease Act. As the other vessels in their fleet have been taken over by the Government this would mean their service would be wiped out.

We would regret this very much because we have been large users of Seatrain services in the handling of crude rubber between New York and the Gulf and finished goods such as tires, etc., to Cuba.

Their method of handling freight in connection with the railroads from and to the sidings of shippers and consignees without break bulk has been of particular value to us in the handling of our commodities, and we believe their efficient and modern methods should not be dispensed with in these services during this period of emergency if there is any practicable way of avoiding it and still accomplish the job we all know must be done.

Their method of handling eliminates the delays and congestion incident to break bulk handling via docks which, of course, is important in these days and unquestionably can become more so, and because of the special construction employed in these car-ferry type of ships, the service cannot be replaced even if standard ships were available which of course they are not.

We are aware of course that your honorable body will give consideration to all angles of the question before making a decision, and we are taking the liberty of acquainting you with our views because of our long use of the service and our continuing interest in it for what it may be worth.

Yours very truly,

C. B. SIPES,
General Traffic Manager.

CBS: JHL.

304 CARBIDE AND CARBON CHEMICALS CORPORATION

30 EAST 42ND STREET

NEW YORK, *July 16, 1941.*

File "E"

Admiral E. S. LAND,
Chairman, U. S. Maritime Commission, Washington, D. C.

Subject: Retention of Seatrain Vessel

SIR: We have been informed the British Government has asked for the remaining two vessels of the Seatrain Lines, Inc.

We have recently completed the construction of a chemical plant at Texas City, Texas, where various National Defense materials are now being produced. The Seatrain Lines, Inc. are adjacent to our plant and provide a service to Hoboken, N. J., which is vitally important to our transportation needs.

Our affiliated company, Electro Metallurgical Company, is very desirous of having the Seatrain Lines, Inc. maintain their service from Havana, Cuba to Hoboken, N. J., for the transportation of manganese ore, a vital National Defense raw material.

As forty-one ships have already been taken out of the service between the North Atlantic and Gulf ports, it is imperative that the Seatrain vessels be retained in their present service. We strongly urge you to do so.

Yours very truly,

(Sgd.) C. H. BEARD,
General Traffic Manager.

EOB: FG.

305 THE FLINTKOTE COMPANY

NEW ORLEANS, *July 19, 1941.*

Honorable E. S. LAMB,
Chairman, U. S. Maritime Commission, Washington, D. C.

DEAR SIR: We have observed from press dispatches that the Maritime Commission plans on requisitioning the Seatrain New Jersey and Seatrain Texas. The curtailment of coastwise service has already had an adverse effect upon the commerce of our country, and unless these vessels are urgently needed in the United States Defense Service, we urge that they be allowed to continue in the coastal service where they are now being used in transporting raw materials as well as finished goods between manufac-

turers and distributors who are also supplying materials that are being used in Defense projects.

A further withdrawal of coastwise tonnage will seriously hamper the flow of traffic, thereby increasing congestion and creating an uneconomic condition*ed* unparalleled in the history of our country. There are now developing at junction yards and interchange points bottle-necks, reducing the free flow of traffic to the point of congestion, impairing expeditious service, and delaying movements.

We, as manufacturers of roofing materials and allied products, have been furnishing to Government Projects roofing materials, water-proofing materials and damp-proofing materials, and structural board. Our principal raw material in the manufacture of roofing materials is Dry Felt, and because of our limited capacity at New Orleans we have not been able to produce enough Dry Felt to meet the demands made upon us, so that we have been forced to draw a considerable volume of Dry Felt from our Little Ferry, New Jersey mill. This material, because of its inherent nature, cannot be transported by bulk steamer without incurring considerable damage.

A survey recently made in anticipation of reduced coastwise service shows an increase in our cost of transportation approximating $20,000 annually. Naturally this will have its effect upon the prices that we will have to quote to the United States Government as well as our trade in the supplying of this material.

We, therefore, beg the Honorable Commission to allow these vessels to remain in the coastwise service, because we sincerely believe that their services will be just as important in the transportation of materials that will be used in Government Defense as they would when assigned to other duties.

Very truly yours,

THE FLINTKOTE COMPANY,
(Signed) P. E. GOLDEN,
Traffic Manager, Southern Division.

PEG:MH.

306 COLLIN COUNTY MILL & ELEVATOR CO.

DALLAS & MCKINNEY, TEXAS, *July 19, 1941.*

Honorable EMORY S. LAND,
Chairman, United States Maritime Commission,
Commerce Building, Washington, D. C.

DEAR SIR: We are told that your commission is giving some thought to further curtailment of the Seatrain service and placement of these vessels in service under the Lease-Lend Bill.

As an individual, and speaking unofficially for I believe nearly

every taxpayer, the writer is very thoroughly in accord with doing everything possible to aid England; however, in this particular instance we think these vessels should remain in the coastwise service and other vessels taken in their place.

As you know the Seatrain ships are particularly adapted for handling commodities like flour and certainly contribute to the efficient use of freight cars, because in most instance flour is loaded in excess of 100,000 pounds per car.

The writer is under the impression that gauges of railroads in most European countries is not the same as used in this country, consequently Seatrain boats would not be as flexible as more conventional type carrier for service overseas.

For a long time between 30% and 50% of this company's business has been moved by water from our Texas ports and since the impairment of withdrawal of practically all these services we find it necessary to curtail our operations and withdraw from markets where we have done business over a period of a great many years.

The government, when determining lend policy on wheat, we felt sure, had in mind that the loan basis on wheat in Texas contemplated a continuance of outlets via boats. There are no existing rail rates that will permit shipment of flour to the Atlantic Coast when consideration is given to the fact that the government loan was established with the idea of utilizing cheaper water transportation.

Withdrawal of Seatrain service to New York will destroy the last remaining portion of flour business which mills and wheat producers have enjoyed, consequently we very earnestly suggest that if there are any other vessels available that they should be placed in overseas service instead of the few remaining coastwise boats.

Yours very truly,

(Signed) J. MITCHELL,
General Manager.

JM;dib.
Airmail.

307 HOUSTON, TEXAS, *July 16, 1941.*

Admiral EMORY S. LAND,
Chairman United States Maritime Commission,
Washington, D. C.

We are informed you are giving consideration to turning over for British use under lease-lend act Seatrains Texas and New Jersey now in Atlantic coastwise service between Hoboken and Texas City. Houston's important position as a distribution center is based almost entirely on its coastwise steamer service. Further curtailment this service will jeopardize its very existence as a

distribution center causing serious injury to business generally and will endanger enormous investments in warehousing and other facilities here which have been built largely on the strength of coastwise service. Moreover defense industries being constructed and operated in this area have without question based their operations upon availability of coastwise transportation and we believe this important defense activity should be protected. In view of these facts we urge you leave two Seatrains in present service and to make every possible effort to allocate to coastwise service between eastern ports and port of Houston other steamers to replace those already withdrawn.

W. S. COCHRAN,
President Houston Chamber of Commerce.

308 10:20 A. M., JULY 16, 1941.

CHAIRMAN OF U. S. MARITIME COMMISSION,
Washington, D. C.

We wish to protest taking off the boats of Seatrains Incorporated to Houston because such action will shut down at least half of our plant and of many others here.

THE COX FENCE CO. *of Houston.*

309 THE MCALESTER FUEL COMPANY
3002 JUNIUS STREET

DALLAS, TEXAS, *July 17, 1941.*

MR. EMORY S. LAND,
Chairman, Martime Commission, Washington, D. C.

DEAR SIR: We are today informed that your commission is giving consideration to an order whereby Seatrain Lines, Inc. boats, Texas and New Jersey, would be withdrawn from domestic service. Our information is to the effect that under the terms of the Lend Lease Act these boats would be requisitioned and placed at the disposal of the English government.

As shippers employing the services of these boats, we wish to register a protest against this contemplated action. Our protest, of course, is based on the assumption that the report which we today received is correct.

Our company markets a quality of lubricating oil refined from a special crude obtained from only one field in Arkansas. After several years of hard work and the expenditure of a considerable sum of money, we have succeeded in bringing this oil to the attention of a number of large customers in the City of New York. Among these are the City of New York itself, a group of the most important bus companies serving the metropolitan area,

and the largest taxi-cab companies operating in New York City.

This lubricant seems to serve the purpose of these users more economically than any lubricant they have been able to secure prior to the time they discovered and tested the oil with which we now supply them. To obtain the business, however, we were obliged to reduce our margin to the lowest possible point and to deliver this oil by the very cheapest method of transportation available. The only method that we were able to work out to enable us to hold this business was the tank car service available via the Seatrain Lines, Inc. In spite of the quality advantage which we enjoy in our oil, we feel that our future business with these New York concerns would be gravely jeopardized if we were to be deprived of the services and low rates which the Seatrain Lines, Inc. have been able to give us on this movement.

310 Of course, we recognize and cheerfully submit to all reasonable sacrifices necessary for the protection of this country and the interests of this country's citizens. We gravely doubt, however, whether the added burden of freight, which will inevitably be thrust upon the railroads by reason of the seizure of our coast-wise vessels, will not more than off set and retard the help which this country has promised to Britain.

In the light of the continuing large losses of ships carrying cargoes to Britain, it appears wholly possible that we might give England all of our ships without assuring her of victory. We doubt whether it is good economics or a practical defense measure to give to England or to anyone else ships or any other article which may ultimately be necessary for our own protection.

We are sure that before you reach a final conclusion in this matter that it will have your very careful consideration. In this we hope that you will give consideration to our protest and find in the last analysis that the contemplated action reported to us will not be necessary.

Very truly yours,

THE MCALLESTER FUEL COMPANY,
D. M. FAULKNER, *Vice President.*

HCP/mas.

cc–

Senator Tom Connally, Washington, D. C.
Representative Hatton W. Summers, Washington, D. C.
Senator Burton K. Wheeler, Washington, D. C.
Senator Gerald Nye, Washington, D. C.
Senator Bennett Champ Clark, Washington, D. C.

bcc: General Lubricants, Inc., 514 West 57th Street, New York, New York.

bcc: Seatrain Lines, Inc., Republic Bank Bldg., Dallas Texas.

311 TEXAS CITY, TEXAS, *July 16, 1941.*

E. S. LAND,
Chairman, U. S. Maritime Commission,
Washington, D. C.

Understand Commission contemplates requisitioning SEATRAINS TEXAS and NEW JERSEY for British use under lease lend act. To further curtail the about extinguished coastwise service between Texas and Atlantic Seaboard by requisitioning of two more seatrain vessels in our opinion places financial burden on shippers and receivers using water service. Even so Seatrain limited service only available under permit system for booking freight, but at that such users of this service can still continue doing some business which otherwise would not be possible.

312 Likewise, large investment in dock and rail facilities built for this purpose at Texas City about one year ago would be made useless and local labor would be affected. Seatrain service makes possible transportation of oversized machinery fabricated along Atlantic Seaboard plants vital to construction of important projects in this section, not readily or in cases not transportable via rail or other type vessels. We urge unless utmost emergency ex ts in defense program that Seatrains Texas and New Jersey be not withdrawn from present service.

TEXAS CITY BOARD OF TRADE,
H. B. MOORE, *President.*
TEXAS CITY CHAMBER OF COMMERCE,
C. C. RUST, *Pres.*
TEXAS CITY TERMINAL RY. CO.,
H. J. MIKESKA, *Vice Pres.*

Chg. T. C. T. RY. CO,
Night Letter

313 THE AMERICAN METAL COMPANY, LIMITED
61 BROADWAY

NEW YORK, *July 16, 1941.*

Traffic Department. Cc. Mr. H. H. Benedict, Gen. Frt. Agt., Seatrain Lines, Inc., 39 Broadway, New York, N. Y.

ADMIRAL E. S. LAND,
Chairman, United States Maritime Commission,
Washington, D. C.

DEAR SIR: We have heard that the Government proposes to requisition two more vessels of the Seatrain Lines, Inc., thus depriving New York entirely of Seatrain service. If this news is true, we hope that the Commission will weigh very carefully the

effects of such action on the Port of New York and vicinity. The two Seatrain boats are performing a very useful service in the trade between New York, Cuba and the great Southwest. These boats are especially designed for this trade. Their removal would take away another of the few remaining links between New York and the Gulf ports, besides injuring the service between New York and Cuba.

Our immediate concern is for our subsidiary, U. S. Metals Refining Co., at Carteret, N. J., who operate a large copper and lead refinery. They have been receiving via the Seatrain, gold ores from Cuba, salt from Louisiana, lead concentrates from Texas, and scrap lead, copper and brass from the Southwest. If the remaining Seatrain boats are removed from service, some of the traffic which Carteret is now receiving via the Seatrain would be lost entirely, while other traffic will have to be handled via much more expensive routes.

We fully understand that the existing emergency requires strong measures on your part in the allocation of ships, but it will be a great loss to this port if the remaining Seatrain ships are requisitioned. We offer these views for your consideration.

Very truly yours,

THE AMERICAN METAL COMPANY, LIMITED.

———— ————, *Traffic Manager.*

FEM: BP.

314 THE RUBEROID CO.

JULY 23, 1941.

Admiral A. S. LAND,

Chairman, U. S. Maritime Commission, Washington, D. C.

DEAR SIR: We have heard reports to the effect that the Maritime Commission is giving consideration to taking over one or more vessels now operated by Seatrain Lines, Inc., between Hoboken, N. J., on the one hand, and the Gulf Ports and Havana, Cuba, on the other.

We earnestly trust that your Commission will not find it necessary to take such drastic action. Seatrain Lines, Inc., are providing a most vital service. No other water carrier in this trade can handle carload shipments in bulk. If we are forced to use other carriers, freight which would otherwise move uncrated or unpackaged would have to be placed in containers, and some container materials are urgently required for national defense.

Besides, many vessels have been taken out of the North Atlantic-Gulf Service, as you know, and the higher rail rates that we would be compelled to pay would only increase the cost to the user at a time when every effort is being made to prevent higher prices.

We hope that these views will receive the consideration of your Honorable Commission.

Yours very truly,

THE RUBEROID CO.
(Signed) Mr. B. H. RUBENSTEIN,
General Traffic Manager.

315 JULY 16, 1941.

Admiral E. S. LAND,
Chairman U. S. Maritime Commission,
Washington, D. C.

DEAR SIR: We are informed that there is some prospect that the British may request that our Government turn over to them the remaining vessels in the fleet of the Seatrain Line.

This Line is the only one presently available, and quoting low rates, which calls in Ports of South Texas.

If this transpires, the result will be serious for this company inasmuch as we manufacture a varied line of Writing Inks, Adhesives, etc., of which we ship approximately 40 carloads annually to Texas. Much of this merchandise is of the 5 & 10¢ variety, where every item of expense must be carefully held down if a profit is to result. Furthermore, it is impossible to ship many of our products, such as Ink, Mucilage and Paste, during the winter months unless adequate protection against freezing is provided by the Transportation Company, and on that account shipping via the Seatrain Line has been a valuable service in this business.

We therefore sincerely trust that turning over these few remaining ships available in this service will be decided against.

Respectfully yours,

S. S. STAFFORD, INC.,
———— ————, *President.*

WSS:A

316 CONSOLIDATED STEEL CORPORATION, LTD.

SHIPBUILDING DIVISION

P. O. Box 481

ORANGE, TEX., *July 17, 1941.*

Admiral EMORY S. LAND,
Chairman United States Maritime Commission,
Washington, D. C.

DEAR ADMIRAL LAND: Information, considered to be of a reliable nature, reached us to the effect that the United States Maritime Commission is considering the turning over for British use, under the Lend-Lease Act, the remaining two vessels of the Seatrain Lines, Inc., which are now in operation between Hoboken, N. J., and Texas City, Texas.

With some thought in mind of the effect this action will have upon us individually; and reserving, of course, any comment upon the general economic situation resulting from the discontinuance of Seatrain coastwise service, it is to be trusted that the Commission's plans are only informal in their nature.

Our own program, as it is related to National Defense and the construction of twelve destroyers of the DD445 type for the United States Navy has made us dependent upon Seatrain service. Many of our commitments are contingent on the factor, not alone of water transportation, but of the character of service which only Seatrain is capable of rendering. It would, in our sincere opinion, multiply our already concern of adequate transportation should Seatrain service be entirely withdrawn.

Trusting our expressions may have your consideration, we are

Very truly yours,

CONSOLIDATED STEEL CORPORATION, LTD.,
Shipbuilding Division.
H. B. HIRD, *Vice President.*

JBH:vb.
cc: RF.—CF.—TF. TALL. Mr. W. F. Pruden.

317 COMMERCIAL METALS COMPANY, LTD.

DALLAS, TEXAS

JULY 19, 1941.

Mr. EMERY S. LAND,
Chairman U. S. Maritime Commission, Washington, D. C.

DEAR SIR: We have been reliably informed that the Maritime Commission has under consideration the question of taking over the remaining boats of the Sea Train Line now operating from gulf ports via Cuba to New York to be turned over to the British for use under the Lease-Lend Act. The purpose of this letter is to point out to you the importance of this service to our operations and to urge that thorough investigation and full consideration of all factors involved be given to this matter before such action is taken.

For your information, we have been using Sea Train service continuously for shipments of all grades of scrap metals and iron from the southwest through the gulf ports to eastern ports through Sea Train Terminal at Hoboken for a number of years and this service is very essential not only from the point of more economic freight but on account of the type of service rendered. By shipping in connection with Sea Train we can load material from the warehouse into railroad cars loose and the material will arrive at destination in the same car with seals intact eliminating consid-

erable loss of material in handling experienced on shipments by other steamship lines. Also, for your information, we have now a movement of approximately 2,300 tons scrap iron in the process of shipment from Cuba to New Orleans. We feel that the fact that these shipments of ferrous and non-ferrous scrap metal are vital to the defense program should be taken into consideration and that the discontinuation of this service would be a severe blow to the uninterrupted flow of shipments now moving.

The available steamship service from gulf ports to Atlantic ports have already been reduced to a small fraction of original tonnage and we feel that this type of service should not be discontinued completely and that some boats should be left in operation. We understand, also, that due to the manner in which Sea Train shipments are handled in that entire railroad cars are loaded on the boat this type of boat would not be very adaptable for use under the Lease-Lend Act.

Of course, the relative importance of the value of this service as compared with urgency and need of additional tonnage for British use is a matter to be decided by the Maritime Commission but we wanted to put the facts before you and impress upon you the importance of this service not only to ourselves but to other industries which are availing themselves of the service as we believe to the benefit of the defense program.

Yours very truly,

COMMERCIAL METALS COMPANY, LTD.
PERRY T. RENNER, *Traffic Department.*

ptr/wes.

318 CERTAIN-TEED PRODUCTS CORP.
100 E. 42 Street
NEW YORK CITY

Admiral EMORY S. LAND,
Chairman, U. S. Maritime Commission, Washington, D. C.

DEAR SIR: It has come to our attention that the Government is considering requisitioning two additional boats from the Seatrain Lines.

We sincerely trust that the Maritime Commission can find some other means of satisfying its requirements without further curtailing the services of Seatrain. We have used this line to a large extent in carrying on our business between Hoboken, N. J., and points in Louisiana and Texas and have used them considerably in exporting to Cuba. Abolition or further curtailment in their service will seriously disrupt our business and unquestionably cause higher prices to be reflected in the materials which we buy

and sell. The Seatrain Lines have established themselves in the Coastwise and Gulf trade as a very efficient carrier and have done much toward opening up new markets for manufacturers in all of the territory which they can serve.

It is our hope that the Maritime Commission takes cognizance of these facts and permits the Seatrain Lines to continue their operations without further restrictions.

Very truly yours,

(Signed) E. J. ELDRIDGE,
General Traffic Manager.

319 BURRUS MILL & ELEVATOR CO. OF OKLAHOMA

KINGFISHER, OKLA.

JULY 21, 1941.

Honorable EMORY S. LAND,
Chairman, United States Maritime Commission,
Commerce Building, Washington, D. C.

DEAR SIR: It has come to our attention that the Maritime Commission is considering the advisability of discontinuing service of the "Seatrain New Jersey" and the "Seatrain Texas", in order that these vessels may be used for aid to the British. Although we are in sympathy with the movement for the British, we do not believe that in view of the fact that our coastwise service has already been reduced considerably during the past few months that these ships should be taken out of coastwise service at this time.

The movement of grain products to the Atlantic Seaboard from the Southwest is practically solely dependent upon water passage because of our freight rate set-up and price structure. This year this movement is more important than ever before because of the large carry over of Government stocks and an indication at the present time that wheat as far north as Kansas City will be forced to move to South Texas ports in order to find storage facilities.

Should our coastwise service be further curtailed, the only solution would be the additional building of storage elevators and warehouses which would appear to be out of line, as this labor and material could be used to a much better advantage on defense projects. It also appears that the transportation lines should certainly maintain enough service to permit the stocks of grain in the United States to be moved to the advantageous storage points rather than to cut off this service and force the building of elevators and warehouses in some parts of the United States while these same types of houses are idle in other sections of the nation.

Seatrain passage has always been considered a most desirable

type of transportation for flour, as their cargo is carried at a very low cost in respect to both time and labor.

Should "Seatrain New Jersey" and "Seatrain Texas" be withdrawn from the service which they are now performing, the farmers of the Southwest, as well as the processors, will suffer materially, and if there is any possible way that these vessels can be left in their present capacity, we urge that this be accomplished.

Yours very truly,

———— ————, *Manager.*

JSE: pc.

320 (a) Why service rendered by other carriers is not sufficient?

(b) Why they decided to use applicant's services?

(c) How much traffic have they given applicant?

(d) What carrier moved that traffic prior to institution of service by applicant?

(e) What effect would denial of application have upon their business?

NOTE: The Commission's field representative should check, so far as possible, the accuracy of statements made by the users of applicant's service.

Q. 37. From your examination of the records of applicant, what is your opinion as to whether there is satisfactory proof that the service is justified, considering the statutory requirements with respect to public convenience and necessity or consistency with the public interest and the national transportation policy?

A. Considering the volume of traffic handled and the financial return so far, and the desire of so many shippers and commercial organizations for the service, it is my opinion that such service is justified and should be maintained in the interest of the public.

IV. Exempt Operations.

Q. 38. Is applicant engaged in any transportation by water which is not covered by the application?

A. Yes. If answer is "Yes", explain nature of such transportation.

Carrier has operated vessels between New York and Havana, Cuba, and New York and New Orleans, La., since 1933, such operations being reported to the Commission annually in "Annual Report Form K" and in a separate application for a certificate as common carrier under Docket W-543.

Q. 39. Does any transportation covered by the application appear to be exempt? I. e.:

(a) Transportation of commodities in bulk when not more than three such commodities and no commodity not in bulk transported in a vessel or tow (Section 303 (b) and (c)).

321 (b) Transportation of liquid cargo in bulk in certificated tank vessel designed exclusively for such use (Section 303 (d)).

(c) Transportation by water for a carrier subject to the Act (Section 303 (f)).

(d) Transportation within a single harbor or contiguous harbors but not under common control, management, or arrangement (Section 303 (g)).

(e) Transportation by small craft and ferries, salvors, etc. (Section 303 (g)).

(f) Intrastate or foreign transportation not subject to Part III.

(g) Private transportation.

A. No. If answer is "Yes," describe such exempt transportation.

Q. 40. Should application be amended by reason of the answers to questions 38 or 39?

A. No. If answer is "Yes," explain.

GENERAL INFORMATION

Q. 41. What persons controlling, controlled by, or under common control with the applicant are engaged in business connected with applicant's transportation service? State generally nature of such business and nature of affiliation. If such person is a user of applicant's service, explain fully.

A. See attachment.

322 Question No. 41

Hoboken Manufacturers Railroad, entire capital stock of 400 shares owned by the applicant.

This railroad does not use applicant's service, but the applicant uses the railroad's service, as it acts as a connecting link between the trunk lines and the applicant's steamship piers at Hoboken, New Jersey.

The following officers and directors of the applicant shown in the attachment herein are officers and directors of the Hoboken Manufacturers Railroad.

Officers

Graham M. Brush, President.
Joseph Hodgson, Vice President.
E. K. Morse, Vice President.
George S. Amory, Vice President and Treasurer.
Donald W. Smith, Assistant Secretary.

Directors

George S. Amory, Walter L. Conwell, Joseph Hodgson, E. K. Morse, Graham M. Brush.

323 (See Questions 24 through 30, Pages 9 and 10.)

Chart B

Column #1	Column #2	Column #3	Column #4	Column #5	Column #6	Column #7	Column #8
Freight service						Passenger service	
Ports served subsequent to Jan. 1, 1940, and prior to Feb. 1, 1941			Number of calls	Commodities		Ports served since service instituted	
Name	Date first served prior to Feb. 1, 1941	Date last served	Annual basis	Number loaded	Number discharged	From—	To—
New York, N. Y.	May 24, 1940	Continuously as indicated in Column #4.	52 until July 2, 1941, and 26 from that date to and including present time.*	130	40	None	None
Texas City, Texas.	May 31, 1940	Continuously as indicated in Column #4.	52 until July 2, 1941, and 26 from that date to and including present time.*	40	130	None	None

*Calls made weekly up until July 2, 1941. On June 25, 1941, the United States Maritime Commission requisitioned the S. S. Seatrain "New York" and on July 2, 1941, the S. S. Seatrain "Havana" for use by the Navy. Rearrangement of services by reason of such requisitioning resulted in biweekly service from the Ports of New York and Texas City instead of weekly service as provided prior to July 2, 1941.

324 INCOME STATEMENT, SEATRAIN LINES, INC., THREE MONTHS ENDING MARCH 31ST, 1941 COMPARED WITH THE SAME THREE MONTHS OF THE PREVIOUS YEAR

	Year to date 1940	Year to date 1941
Water Line Operating Income:		
Gross Freight Revenue:		
New York to Havana	153, 275. 33	145, 110. 17
New York to New Orleans	122, 897. 89	120, 878. 71
Havana to New Orleans	128, 998. 12	230, 457. 53
New Orleans to Havana	136, 581. 60	165, 029. 49
New Orleans to New York	127, 631. 62	139. 955. 52
Havana to New York	103, 454. 62	95, 509. 90
New York to Texas City	.....	194, 227. 21
Texas City to New York	.....	242, 956. 93
	772, 809. 18	1, 342, 924. 39
Less Deductions	100, 795. 09	140, 863. 20
Net Freight Revenue	672, 014. 09	1, 201, 961. 16
Rent of Locomotive	1, 449. 12	1, 419. 42
Miscellaneous Revenue	965. 05	1, 062. 71
Total Operating Revenue	674, 428. 26	1, 204, 444. 29
Water Line Operating Expenses:		
Maintenance	81, 746. 57	146, 388. 93
Traffic Expenses	50, 065. 18	65, 244. 55
Transportation Expenses	174, 307. 30	286, 689. 50
General Expenses	47, 858. 99	75, 643. 66
Charters—Freight Car Rental	67, 795. 59	91, 742. 05
Total Operating Expenses	421, 773. 84	665, 708. 61
	252, 654. 72	538, 735. 68
Water Line Tax Accruals	57, 027. 72	134, 963. 86
Water Line Operating Income	195, 627. 00	404, 071. 82
Other Income:		
Income from Unfunded Securities & Accts	6, 342. 78	6, 342. 78
Profit on Exchange	235. 25	1, 783. 89
Gross Income	202, 205. 03	412, 198. 49
Deductions From Gross Income:		
Miscellaneous Rents	15, 349. 13	15, 911. 23
Interest on Funded Debt	13, 659. 92	46, 488. 77
Interest on Unfunded Debt	1, 050. 00	600. 17
Miscellaneous Fixed Charges	897. 39	897. 39
Total Deductions	30, 956. 44	66, 897. 64
Net Income	171, 248. 59	345, 300. 79

EXAMINER'S NOTE: This income statement is submitted to show the increase of approximately $174,000.00 in the total net income of the company for a three month period after the inauguration of the service between New York, N. Y. and Texas City, Texas.

330 *Order*

At a session of the Interstate Commerce Commission, Division 4, held at its office in Washington, D. C., on the 18th day of December A. D. 1943

No. W-543

SEATRAIN LINES, INC., COMMON CARRIER APPLICATION

Upon further consideration of the record in the above-entitled proceeding and good cause appearing therefor:

It is ordered, That this proceeding be, and it is hereby reopened for reconsideration.

By the Commission, division 4.

W. P. Bartel,

[SEAL] W. P. BARTEL, *Secretary*

343 *Order*

At a Session of the Interstate Commerce Commission, Division 4, held at its office in Washington, D. C., on the 27th day of January, A. D. 1944.

No. W-543

SEATRAIN LINES, INC., COMMON CARRIER APPLICATIONS

It appearing, That on December 18, 1943 Division 4, upon further consideration of the record in the above-entitled proceeding, and good cause appearing therefor, reopened the said proceeding for reconsideration:

And it further appearing, That question has arisen as to whether the findings of Division 4 in its report of July 2, 1942, and the certificate and order issued in connection therewith on that date, which certificate and order became effective on August 10, 1942, and which authorize applicant to operate as a common carrier by self-propelled vessels, in interstate or foreign commerce, in the transportation of commodities generally between the ports of New York, N. Y., New Orleans, La., and Texas City, Tex., by way of the Atlantic Ocean and the Gulf of Mexico, are not too broad.

It is ordered, That the said proceeding be, and it is hereby reopened for hearing upon the question of whether or not the said findings and certificate and order of July 2, 1942 should be modified so as to authorize applicant to continue to operate in service in which it was engaged, except for interruptions beyond its control, namely, as a common carrier by the "Seatrain" type of vessels in the transportation of liquid cargoes in bulk; of empty rail-

road cars, and of property loaded in freight cars received from and delivered to rail carriers and transported without transfer from the freight cars between the ports above mentioned.

And it is further ordered, That this proceeding be, and it is hereby assigned for hearing at the offices of the Commission in Washington, D. C., at 9:30 A. M. on February 28, 1944, before Commissioner Porter and Examiner Copenhafer.

By the Commission, Division 4.

[SEAL] W. P. BARTEL, *Secretary.*

363 Before the Interstate Commerce Commission

Docket No. W-543

IN THE MATTER OF SEATRAIN LINES, INC., COMMON CARRIER APPLICATION

HEARING ROOM "B,"
INTERSTATE COMMERCE COMM. BLDG.,
Washington, D. C., Monday, March 27, 1944.

Met, pursuant to notice, at 9:30 o'clock a. m.

Before CLAUDE R. PORTER, Commissioner, and DAVID T. COPENHAFER, Examiner.

Appearances: Parker McCollester, Esq., 25 Broadway, New York, N. Y.; appearing on behalf of Seatrain Lines, Inc. Joseph F. Eshelman, Esq., Broad Street Station Building, Philadelphia, Pa.; appearing on behalf of the Pennsylvania Railroad and A. C. L. R. R. Co.; The B. and M. R. R.; Merrel P. Callaway, Trustee of C. of Ga. Ry. Co.; G. N. Ry., Co.; The L. I. R. R. Co.; L. and N. R. R. Co.; Me. C. R. R. Co.; N. and W. Ry. Co.; N. P. Ry. Co.; Legh R. Powell and Henry W. Anderson, Receivers of S. A. L. Ry. Co.; S. Ry. Co.; S. P. Co.; T. and N. O. R. R. Co.; and U. P. R. R. Co. G. H. Muckley, Esq., 205 Transportation Bldg., Washington, D. C., for Southern Pacific Co., Morgan Line.

364 PROCEEDINGS

Commr. PORTER. This is the time and place set by the Interstate Commerce Commission for hearing Docket W-543, Seatrain Lines, Inc., Common carrier application.

This proceeding was reopened by the Commission for hearing upon the question of whether or not the findings and certificate and order of July 2, 1942, entered therein should be modified so as to authorize applicant to continue to operate in service in which it was engaged except for interruptions beyond its control, namely, as a carrier by the "Seatrain" type of vessels in the transportation of liquid cargoes in bulk, of empty railroad cars, and of property loaded in freight cars received from and delivered to rail carriers

and transported without transfer from the freight cars between the ports mentioned in the findings and certificate and order.

The commission will be represented by Commr. Claude R. Porter and Examiner David T. Copenhafer.

Who appears for the applicant?

Mr. McCollester. Parker McCollester.

Commr. Porter. And any appearance on behalf of other parties?

Mr. Eshelman. G. H. Muchley and J. F. Eshelman for the railroads which are party petitioners in Docket 2092, before the United States District Court for the District of New York. I have given the names of the individual railroads to the Reporters, and will recite them if you wish.

Commr. Porter. Very well.

Mr. Muckley. In addition to that, Mr. Commissioner, I appear also for the Southern Pacific Company, Morgan Lines, as additional carriers.

Commr. Porter. Is the Applicant ready to proceed?

STATEMENT OF PARKER MCCOLLESTER IN BEHALF OF APPLICANTS

Mr. McCollester. If the Court please, I have filed with the Commission, and I assume that it has been received—it was sent down by mail—a motion for the vacation or rescission of the Commission's order of January 27, 1944, reopening this proceeding for hearing on the questions stated in the order.

The motion and the argumentative material which was stated in the document in which the motion was included I think indicates the ground of our motion, namely, that the certificate having been issued a year and a half ago, approximately, and having without objection or protest on the part of anyone, become effective on the 10th of August 1942, is not now subject to alteration or change in such a way as to modify or revoke the operating rights thereby granted.

We feel that this is a very fundamental question as to
365 whether the Commission may revoke or modify in part rights which have been granted and which have become effective.

Under the Motor Carrier Act the Commission has held, and I think properly, that it is without such power.

Commr. Porter. But that is squarely under a section that is found in Part 2, and no other part of the Act that I am aware of.

Mr. McCollester. I think, Mr. Commissioner, that Part 3 is even stronger on the point because Part 3 contains no provision whatever for the revocation of a certificate once granted except it would be under your inherent power to revoke for fraud or misrepresentation in its procurement. If it were not so, the whole business——

Commr. PORTER (interposing). Haven't you overlooked Paragraph (c) of Section 315 of Part 3, "The Commission may suspend, modify, or set aside its orders under this Part upon such notice and in such manner as it shall deem proper."

Mr. MCCOLLESTER. No, Mr. Commissioner; I have not overlooked that, but I think that——

Commr. PORTER (interposing). You have changed your mind, have you not, since you filed the petition in another case?

Mr. MCCOLLESTER. The Morgan Line Case?

Commr. PORTER. Yes.

Mr. MCCOLLESTER. We have to be right some time; we
366 were turned down in that.

I think that, in fairness, I must say that I think we were not entitled to have the Morgan Line certificate revoked except for this fact, that we did protest in the Morgan Lines certificate. We were at fault at that time, which I am prepared to concede. We probably were, which was in our tardiness in asking for further consideration of the Morgan Line Application.

We attended the hearing and opposed the Morgan Line application, but we did not bring our petition for reconsideration of the Commission's order granting it until after the order has become effective. Unless it be that the case is distinguishable upon the ground that we participated and did protest the Morgan Line Case and offered evidence and that the Commission failed to conduct the full investigation that was requested at the time the proceeding was being heard.

I say, unless the case is distinguishable on that ground, then I think that the Morgan Line Certificate must stand.

I do not think, however, that the situations are the same, but at any rate, if your Honor please, it is our position here, we have made our motion and we ask for a ruling by the Commission on the motion.

I think the section to which your Honor has reference cannot refer to certificates. I think it would be unconstitutional if it did so.

367 I think, furthermore, that as a matter of general policy, if certificates were subject to revocation, having once become effective, and after ample time has been given to all interested, to make their objections, unless to ask for the setting aside or the postponement of the effective date for further consideration, I think that there would be such uncertainty as to the rights of water carriers as seriously to discourage the carriers from going back into water transportation, and I am directed by my client to inform the Commission that until our motion is passed upon, and if the Commission wishes argument on it we are, of course, prepared to argue it more fully; but until our motion is

acted upon, we are not prepared to go forward with any evidence.

Commr. PORTER. Well, I will overrule the motion. Of course, you know without my advising you at all, you have of course a perfect right of appeal to the entire Commission, but at the same time I will overrule the motion.

Mr. MCCOLLESTER. May I, then, at this same time, appeal to the Commission, your Honor? My motion—I do not know; it was addressed to the Commission; I do not know whether I have to file another motion to get it before the Commission or not.

Commr. PORTER. No; I think it can go to the Commission on motion as filed, if you so desire.

Mr. MCCOLLESTER. I should like to have it so, and I
368 think, if your Honor please, that there are other interested water carriers who would probably like to be heard upon the point as to the revocability in whole or in part of a certificate that has once become effective.

Commr. PORTER. Oh, I do not think there need be any argument. I do not see why it cannot go to the Commission on your motion as you have filed it, just like as if I had made a ruling on a question of evidence, and you have your right of appeal of course from an Examiner's or Commissioner's ruling to the entire Commission.

Mr. MCCOLLESTER. Well, I want your Honor——

Commr. PORTER (interposing). Well, I think the Commission might as well test it out in this case as in any other——

Mr. MCCOLLESTER. I think so, too.

Commr. PORTER. Whether or not we have a right after we have issued a certificate, whether our hands are completely bound from suspending, changing, or modifying or in any other way affecting that order.

Mr. MCCOLLESTER. Our position, Mr. Commissioner, only goes to this, to modification, so you revoke any rights that have been granted by the original certificate.

Commr. PORTER. Well, we would——

Mr. MCCOLLESTER (interposing). The statute, of course, permits the Commission to attach from time to time conditions
369 to its order, but in the Motor Carrier cases you said that those conditions should not be such as to affect the rights that were granted.

Commr. PORTER. I am perfectly familiar with that.

Mr. MCCOLLESTER. Yes.

Commr. PORTER. Now, in the Smith Brothers case, that case was bottomed entirely upon the fact that there is a specific section that says that a certificate that has been issued in those cases can only be changed in the method provided by statute, after hearing, and so forth.

Mr. McCollester. That is right. And in Part III I think that you have no position for revocation of certificate whatsoever, and I think the situation is very much like—it is franchise right.

Commr. Porter. Of course I would say that matter is squarely before Division 4 in another case under Part I in the case of a construction down here by the C. & O. and the Norfolk & Western Railroad, where we had briefs filed and argument. That is under Part I, you understand.

Mr. McCollester. I understand. Well, I think the situation is quite similar.

I will say this, Mr. Commissioner, that perhaps my client is in the unenviable position of being sort of made the goat on this point, our case being the first one in which it has arisen, and I think, as your Honor has said, that it would be
370 well to test it out in this case as in any other, this being the first one, so far as I know, where the matter has been challenged.

Commr. Porter. Well, I was going to say we have made changes when the certificate has been granted.

Mr. McCollester. Well, that is our postion.

Commr. Porter. Subject to the over-ruling of my ruling by the Commission, can you proceed with your testimony subject to that ruling, without waiving your right to appeal on that ground to the entire Commission?

Mr. McCollester. Well, we would rather not, Mr. Commissioner, and I am frankly not prepared to proceed until we have that.

Commr. Porter. It might be after hearing, you know, that motion would not be so important.

Mr. McCollester. Well, I do not think it would be very important, and that is one reason why we do not want to put in evidence, because I am a little bit afraid. In fact, I am sure that the decision and that the evidence would have to be one confirming the original order, and since that is so, it might be that you would decide on the evidence rather than the question of law, and we want to have the question of law squarely decided.

Commr. Porter. We might decide, then, that your motion was a moot question.

371 Mr. McCollester. Well, that is possible, but in order that the question of law may be squarely before you, we would rather have it ruled on without evidence so that you cannot decide in favor of the affirmance of the original order, original certificate, on the basis of the proof.

May I say further, Mr. Commissioner—and this is looking ahead rather than to the immediate situation here—that if we

shall later go to hearing on this, I think the hearing ought to be—the two applications ought to be segregated for hearing.

One is a Grandfather Clause application and the other is an application under the interim, calls for a certificate of public convenience and necessity, and I think the issues are different, our proof would have to be different, and the record might be one that you would want them heard in such a way that there would not be any confusion as to the evidence in each.

Commr. PORTER. Well, that ought to be easily handled.

Mr. MCCOLLESTER. I should think it could be easily handled, too.

But for the moment, Mr. Commissioner, our position is just this, that we feel and appeal from your ruling denying our motion and of course we place our case, as we must place ourselves, in the hands of the Commission as to the procedure to be followed, but as to whether the Commission wants to hear
372 argument or receive briefs from us or other parties who may be interested upon this question, I would think that the Commission would want to hear argument or at least receive briefs from all concerned in the Water Carrier Industry, and many others, in order that the matter might be thoroughly thrashed out.

I am not sure, but I am inclined to think that if the Commission should conclude that it can withdraw operating rights which have been granted, we should want to seek a Court review and for that purpose we want to be sure that the matter has been thoroughly presented to the Commission.

Commr. PORTER. Well, I think you will have to do that; so far as the steamship companies are concerned, there is no other party at this time that has raised the question, so it seems to me we had just as well try it out with you as anybody I know of.

Mr. MCCOLLESTER. Well, we are sort of the guinea pig here.

Commr. PORTER. That is your own choice.

Mr. MCCOLLESTER. No. It is not our own choosing. We are somewhat pressed into it, I might say, being the first one up here. But that is the situation, and because of that, I do say that we will be perfectly willing, and indeed, glad to present a more ample brief and argue the matter orally, and we do suggest that
373 the Commission invite interested water lines generally to present their views, but of course that is for the Commission to decide.

At any rate, we appeal from your ruling, and are not now prepared to proceed with evidence.

Commr. PORTER. When would you be prepared?

Mr. MCCOLLESTER. I think, Mr. Commissioner——

Commr. PORTER (interposing). I think I can get this up to the

Commission on the first session in April; no use dragging it along much longer than that.

Mr. McCollester. Well, then, we would have to decide, Mr. Commissioner, whether we would want to take them into Court at once before going to evidence.

Commr. Porter. Sure.

Mr. McCollester. I am not sure about that. I think we probably would, although there are, frankly, objections to going into Court where there has not been a hearing and evidence presented before the Commission.

May I say that in making this motion I have followed a court practice. I do not know whether it conforms entirely with the Commission's practice, in that I have filed an affidavit in support of our motion. I assume that that is in the Commission's files and we should like to have it considered by the Commission.

It simply restates in the form of a sworn affidavit the statements that are in the motion that I prepared.

374 Commr. Porter. And I suppose it is a part of the motion, that it is really an amendment to the motion.

Mr. McCollester. That is right. It is a supporting affidavit, in support of the motion.

Exam. Copenhafer. There is nothing new stated in the affidavit beyond that which is already stated in the motion.

Mr. McCollester. That is correct. The motion is signed by me and the affidavit is signed by Mr. Brush, the President of the Applicant.

Commr. Porter. Does other counsel have anything to say at this time?

Mr. Muckley. We would like to ask leave to file a reply to this motion by Friday of this week. I think that would permit you to get the matter to the Commission in this April conference.

Commr. Porter. Yes; that will be all right. That will be granted.

Mr. Muckley. I am not certain that we want to file a reply, but if we do we will file it by Friday.

Commr. Porter. Mr. Eshelman, do you have anything?

Mr. Eshelman. No; that covers my statement.

Commr. Porter. Off the record.

(Discussion off the record.)

Commr. Porter. Well, I assume that we cannot fix a time for hearing now because that would of course be taking the

375 view that the Commission will sustain my ruling on the motion, and I will put your motion before the Commission at an early date, and then if my position is sustained and the motion is over-ruled by the entire Commission, then of course we will give notice, Mr. McCollester.

Mr. McCollester. Thank you very much.

Commr. Porter. At an early date, as to further hearing, if required.

Mr. McCollester. May I, not for the purpose of delay, Mr. Commissioner, but simply because I think the question here is of sufficient importance, not only to my client but to the industry generally, to merit full discussion, may I couple my appeal from your ruling here with the request that the entire Commission, in considering the matter, have before it briefs of the parties?

I should like very much to discuss before the Commission the cases which you have referred to. With some of them I quite fully agree, and I think they are distinguishable.

I should also like to discuss the particular form of this order, but I do not know that that is appropriate at this time.

But on this particular question of the right to revoke a certificate, in whole or in part, to modify certificates, even if the Commission now concludes that it was in error, I think that is a serious
326 question, whether it has the power to do that, and I think that I would very much like to have the privilege of arguing the matter more fully than I have attempted to do in this motion, which is simply in the form of a motion. But as I say, that is for the Commission to decide.

Commr. Porter. Well, too, it raises the question the Commission has had a great deal of debate on this question, as I have said, in other cases.

Mr. McCollester. But it has not had the questions before it under the Water Carrier Act.

Commr. Porter. No. But under a Statute, Part I, that is almost identical.

I see nothing further, then, that we can do now, and I will bring this entire matter to the attention of the Commission, as I said, at an early date, and should my position be sustained, why then we will give notice at an early date, as early a date as convenient for hearing in the matter.

Mr. McCollester. Mr. Commissioner, if I should desire to supplement what is set forth in our motion before, say, Friday, whatever time it may be to get it before the Commission, could I ask permission to do that?

Commr. Porter. What do you mean; you want to file a brief?

Mr. McCollester. That is what I was thinking, Mr. Commissioner. What I have particularly in mind is you
377 discuss those cases which you have just referred to.

Commr. Porter. Oh, I do not think so.

Mr. McCollester. All I want to do is to be helpful.

Commr. Porter. I do not think they are very persuasive, one way or the other, as far as that is concerned. It is a question of

whether or not the Commission intended, as was said in the Schloss-Sheffield Case; what Justice Brandies said there without any reference to statute whatever, whether or not our statute is broad enough to give us power to go ahead if we should choose to later, and alter this certificate.

Mr. McCollester. Then I understand that you do not want me to file brief?

Commr. Porter. Well, I do not think they will be particularly helpful because I think we are just as familiar with those cases, and the reasons which motivated us in doing whatever we did, Mr. McCollester; I doubt if it would be helpful.

Mr. McCollester. May I just direct your attention to this, which is set forth in the motion, and the supporting affidavit of Mr. Brush, which I think is a pertinent fact, the statement that commitments have been made.

Mr. Copenhafer. Yes; they are general statements.

Mr. McCollester. In reliance upon the certificate granted.

Mr. Copenhafer. Does Mr. Brush's affidavit enlarge on
378 that at all.

Mr. Muckley. I wanted to ask that identical question.

Commr. Porter. No; it is a very general statement, the statement that he has made commitments at this time without specifying what they were or anything.

Mr. McCollester. Your Honor, we are confronted with the fact that this is a war situation, and we had to be particularly careful as to the amount of information we disclosed. In executive session I will be glad to tell you that, but I cannot do that on the record.

Mr. Muckley. There is a whole lot of stuff excused on account of the war.

Commr. Porter. As I said, the matter will be taken up by the Commission at an early date, and if my position is sustained, why, then notice will be given you——

Mr. McCollester. Thank you very much.

Commr. Porter. Of another hearing.

(Whereupon, the hearing in the above entitled matter was concluded at 10:00 o'clock a. m.)

379 *Order*

At a General Session of the Interstate Commerce Commission held at its office in Washington, D. C., on the 3d day of April A. D. 1944

No. W-543

SEATRAIN LINES, INC., COMMON CARRIER APPLICATIONS

Upon further consideration of the record in the above-entitled proceeding and of motion dated March 23, 1944, filed by applicant for vacation or rescission of the order of Division 4 entered under date January 27, 1944 reopening the proceeding for hearing and requesting that further proceedings pursuant to said order be discontinued;

It is ordered, That the said motion be, and it is hereby, overruled without prejudice to its renewal at the conclusion of the hearing to be held pursuant to said order of reopening.

By the Commission:

[SEAL] W. P. BARTEL, *Secretary.*

388 Before the Interstate Commerce Commission

W-543

IN THE MATTER OF SEATRAIN LINES, INC., COMMON CARRIER APPLICATION

ROOM "B,"
INTERSTATE COMMISSION COMMISSION,
Washington, D. C., Monday, April 24, 1944.

Met, pursuant to notice, at 9:30 a. m.

Before CLAUDE R. PORTER, Commissioner, and D. T. COPENHAFER, Examiner.

Appearances: As heretofore noted, and Richard H. Specker, 136 Southern Bldg., Washington, D. C.: appearing on behalf of the National Water Carriers' Association, Inc.

389 PROCEEDINGS

Commr. PORTER. There has been assigned for hearing at this time and place, Docket Number Water Carrier-543, Sea Train Lines, Inc., common carrier application.

The purposes of this hearing are outlined in order of Division Four, January 27, 1944, the previous hearing having been postponed for consideration of a motion filed by applicant for vacation of said order.

That order was overruled by the Commission on April 23, 1944, without prejudice to its renewal at the close of the hearing.

Are there any appearances to be entered in addition to those that were entered when the matter was previously called for hearing?

Mr. SPECKER. Richard H. Specker for the National Water Carriers Association, Southern Building, Washington, D. C.

Commr. PORTER. There were, may I say to Counsel, three petitions for intervention, through the Ocean Steamship Company of Savannah, the petition of the Agwalines, Inc. (Clyde Mallory Lines) for intervention, the Eastern Steamship Lines, Inc., and the Bull Steamship Lines. The petitions have all been filed and they will be allowed to intervene, of course.

Are any of those companies represented here this morning?

We had indications from at least one of them, that I recall, that they asked leave to intervene, but stated that
390 they could not be present at the hearing. They wanted, of course, the privilege of taking any part from now on in the proceedings.

Mr. MCCOLLESTER. Well, I think, Mr. Commissioner, I do not speak for them, but some or all of them, I think have been in communication with me and I have received copies of their intervening petitions. I was informed by them, as you have just stated, that they understand, from the announcement, that the purpose of this hearing would be to take certain evidence and they are not interested in the evidence, but are interested in the question of law involved. Therefore, they would not be present here on the understanding that under the rules of the Commission their petitions of intervention make them a party so they will be permitted to be heard on the law question.

Commr. PORTER. That is correct. They will be permitted to do that, of course.

Is there anything else preliminary to the commencement of the hearing?

Mr. MCCOLLESTER. Let me just say this, Mr. Commissioner: So far as my own experience is concerned, I have filed my appearance without limitation at the previous session. Perhaps in order to squarely raise or to do everything I can, I should say, to
391 raise the jurisdictional question that we seek to have determined here, it might be appropriate that my appearance at this time should be noted as a special appearance for the purpose of objecting to the Commission's jurisdiction to proceed with the inquiry for the purposes indicated in the order of Division Four, on the ground that those purposes are purposes beyond the jurisdiction of the Commission. That would be the appropriate course to take in a court proceeding. I have not seen it done in pro-

ceedings before the Commission, but it may be just one other way to bring the jurisdictional issue up for determination and, if that is appropriate, I would like to have my appearance so listed today.

Commr. PORTER. All right. Are you ready to proceed with hearing now? Mr. McCollester, representing the Seatrain Lines, Inc.

Mr. MCCOLLESTER. Mr. Commissioner, we have no evidence to offer. Our application was filed, the supporting data was presented in support of the two applications.

The certificates have been issued and have been in effect for a year and a half or more, and therefore, we do not conceive that there is any question of fact that can now be before the Commission in regard to them, and, consequently, we have no evidence.

Commr. PORTER. Very well. So that the record may be
392 clear in this matter, and definite, I want to state for the record that these proceedings were reopened for consideration on December 18th, 1943. Also reopened for hearing by an order of January 27th, 1944, and at that time were assigned for hearing by that order on February 18th, 1944.

On request of Mr. McCollester, Counsel for the Seatrain Lines, Inc., the hearing was postponed until March 27th, 1944. Several weeks' notice was given by the Commission for the next hearing, then after the application for postponement of the former hearing had been granted, the hearing was set for March 27, 1944.

At that time the presiding commissioner and examiner suggested that they were ready to receive testimony, but Mr. McCollester, Counsel for the Seatrain Lines, Inc., stated that he had no evidence to present and had also filed a motion at that time upon which he asked a ruling. The presiding commissioner overruled the motion and Counsel then suggested that he did not care to proceed farther and had no evidence at that time, but stated, as I believe the record shows, that he would appeal from the ruling of the presiding commissioner to the entire commission.

The entire commission sustained the ruling of the presiding commissioner, without prejudice, as has been stated heretofore, for a renewal of the motion at the conclusion of a hearing to be fixed.

393 On April 7th, the proceeding was reassigned for hearing on the date of April 24, 1944, so that I think the respondents and Counsel have been duly advised, of course, of the various dates and opportunity given for them to be prepared to proceed with the hearing.

MR. MCCOLLESTER. Mr. Commissioner, in order that there may be no doubt on the record upon the point, I may say that we quite fully agree that we have had ample notice and opportunity to

present evidence, if the matter were one within the jurisdiction of the Commission. We do not contend that the Commission has proceeded here, so far as giving us an opportunity to be heard is concerned, arbitrarily or without adequate notice.

We do feel in the first place that the Commission is without jurisdiction of the matter indicated by the order of Division Four of December 18, 1943, and additional order of January 27, 1944, without jurisdiction over the matters indicated in that order. We also feel that before we should be faced with the necessity of going forward with any evidence, if the Commission did have jurisdiction, the jurisdictional question should be determined.

There are various ways of getting a determination of that issue, and I do not know that we have followed the best one, but it is a vital issue to us, and it is the purpose to obtain, if we
394 can, a ruling on that issue, which has dictated the course which we have followed, and that is our only purpose in following that course.

Your Honor has not stated, but of course the Commission's file will show, that we have now filed a petition to the Commission to reconsider its previous order overruling our motion, or else, in some other way that the Commission may deem appropriate, to consider the jurisdictional question of its authority to revoke rights which have been granted and have become effective, and not only we, but the intervenors, desire to be heard on that legal question in whatever way the Commission thinks is proper.

Commr. PORTER. Of course, I do not care to argue the matter at this time, but personally, I do not think we have made any order or taken any steps or deprived you of any rights from which you could appeal up to date. We have made no final order or judgment of any kind that I know of.

Mr. MCCOLLESTER. That is one of our displays.

Commr. PORTER. I do not know what you can appeal from as yet.

Mr. MCCOLLESTER. We are trying to bring the matter to a head in the interests of all concerned and the Commission will understand that we are doing this with all respect for the Commission because we do think there is a serious question of law here which goes to the point of value of certificates.

Commr. PORTER. I am not stating but what of course ulti-
395 mately that question must be determined, but I just made the suggestion that I did not know how it could be by the course up to date. We have not made any order injuring anybody yet, that I know of.

Well, so that the record may be also clear and definite, I want to say that when the Commission then, since the respondent has said they have no testimony to offer, I want to also at this time

make a part of the record and give notice to the respondent, but in the determination of this matter, the Commission will have before it, and we will take under consideration, the case known as the Investigation of Sea Train Lines, Inc., which is found in 195 I. C. C., Page 215.

The Commission will also have before it the case of the Investigation of Sea Train Lines, Inc., which report is found in 206 I. C. C., Page 328, and also will have before it, and the facts as stated, in Sea Train Lines, Inc. vs. Akron C. & Y. Ry. Co., which case is reported in 226 I. C. C., Page 7, and also Sea Train Lines, Inc. vs. the Akron C. & Y. Ry. Co., 243 I. C. C., Page 199.

So far as the facts are concerned, it appears those reports may be pertinent to a consideration of the situation which we have before us. I think those are the only cases I care to call Counsel's attention to, and which the Commission will consider.

Mr. McCollester. May I, in order to preserve the record from the standpoint of the applicant, Sea Train, Inc., suggest that we will object to the receipt by the Commission now, as
396 part of any evidence, of any matters which were not before the Commission in connection with our application at the time the application was passed upon and the order of the Commission herein was made.

Now, some of the matters Your Honor has referred to, we, ourselves, referred to in our application, and, of course, since they were part of the application or part of the supporting material offered and presented to the Commission for the purpose of entering its order herein, they are before the Commission already and we would have no objection. Now, we want to make the record very clear that we object now to the receipt of any other material than that which was before the Commission when it made its order issuing the certificate.

I cannot, at the moment, tell, Your Honor, just what those matters were, but we had referred to the Commission's findings in those cases.

Commr. Porter. Well, frankly, those are cases, I think, in all of which your operation is quite fully described and set forth.

Mr. McCollester. That is right. We referred to them ourselves for that purpose.

Mr. Copenhaver. I think they are referred to, Mr. McCollester, in the affidavit, submitted by your Vice President.

Mr. McCollester. I think that is true, but I just want to protect ourselves that anything that was not before the Com-
397 mission when the certificates were granted should now be put before the Commission.

Commr. Porter. Well, I am not through yet with my offer that I want in the record either. Those are just the cases that I

want to advise Counsel and note in the record so that you would have an opportunity to raise any questions that you have to raise.

Now we also want to call attention of Counsel for respondents, and let the record show that the Commission will have before it, of course, and consider the application dated May 28th, 1941, filed with the Commission by the Sea Train Lines, Inc., on May 29th, 1941—that is the affidavit of filing, the last date—together with——

Mr. McCollester. There were two applications, Mr. Commissioner.

Commr. Porter. I understand. I will get to that.

Mr. McCollester. I am sorry.

Commr. Porter. Let me make my offer and then you make your objection—together with an affidavit executed by Mr. A. K. Morris, Vice President of the Seatrain Lines, Inc., requesting authority to continue to operate as a common carrier by water between New York and New Orleans, via Havana, Cuba, or direct, together with the exhibits attached thereto.

The Commission will also have before it, at the time of its determination, and take into consideration, another application filed by Seatrain Lines, Inc., dated May 28th, 1941,
398 and filed with the Commission on May 29th, 1941, by the respondent, Seatrain Lines, Inc., which was executed by E. K. Morse, Vice President, for authority to continue to operate as a common carrier by water between New York and Texas City, Texas, direct or by way of Havanna, Cuba, which operation was commenced May 24th, 1940, together with the exhibits that are attached in connection with that application.

May I say the Commission will also have before it, in passing upon this question—and we will consider, and I desire Counsel to be advised of it at this time—that a report was submitted by letter of William F. Martin, Examiner of the Commission, dated December 6th, 1941, with which was transmitted a questionnaire giving information as to the operations instituted by Seatrain Lines, Inc., in May, 1940, between New York and Texas City, which included an affidavit executed by the same E. K. Morse, as Secretary of Seatrain Lines, Inc., giving the names of directors and officers of said lines.

Also before the Commission will be a letter of Mr. E. K. Morse as Vice President of Seatrain Lines, Inc., dated November 26, 1941, File B, addressed to W. F. Martin, Examiner of the Commission at New York, with accompanying papers which consisted of an affidavit of Joseph Hodgson, Vice President of Seatrain Lines, Inc., and papers attached thereto, outlining the development of the plans of his company for a Texas service, together with copies of letters from various shippers

399 and receivers of freight and others indicating the need for such service.

Also the Commission will have before it, letters of December 4, 1941, from and to the same parties giving details as to the amount of cargo furnished by the writers of the letters submitted with the letters of November 26, 1941, and letter of December 5, 1941, supplementing the letter of December 4, 1941, enclosing list of firms which has not made any shipments on Seatrain steamers during the first quarter of 1941.

In other words, all of the documents, Mr. McCollester, that I have referred to, as perhaps you are aware, are in the docket of the Commission, and are parts and were considered in connection with the two applications that I have referred to. Of course you appreciate, I know, as a good lawyer, that I refer to these, and I identify them in this way in the record so it may be said that they have been called to your attention and you have knowledge of what the Commission may consider when it goes to issue a final report, if it does, in this matter.

Mr. McCollester. I thank Your Honor for bringing those matters to our attention. If I correctly understand, all of the material to which Your Honor has referred, is material which was presented in connection with the applications considered by the Commission in issuing its order of July 2, 1942,
400 which contains certificate and was the material upon which that certificate was based.

If that clearly appears, of course, we, ourselves, would want that. We want to have that clearly understood. The only objection we would have to the consideration by the Commission at this time, or the receipt for purposes of consideration of any evidence or material of any sort in the nature of factual information which was not before the Commission and was not considered by it in issuing the certificate.

Commr. Porter. Well, Counsel understands of course that the reports of the Commission to which I have referred and identified in the record here, were all matters of our records and were before us at the time, and were available to us at the time we issued the certificates.

Mr. McCollester. That is right.

Commr. Porter. And that is also true of these offers I have just made of documents and letters directly connected with at the time of your application. They are all in the docket and they are, of course, subject to inspection and examination by respondent's Counsel at any time.

Mr. McCollester. Yes; and, of course, Mr. Commissioner, we take the position that the certificate was issued in the light of all of the facts disclosed thereby.

Commr. PORTER. Now, does anybody else, any other Counsel in the case, have any testimony that they desire to offer this morning?

401 (No response.)

Commr. PORTER. I understand, Mr. McCollester, in representing Seatrain Lines, Inc., that you have no testimony that you care to offer at this time.

Mr. MCCOLLESTER. No, Mr. Commissioner, I am not appearing here—if I may limit my appearance—for the purpose of appearing generally and presenting testimony, and as I say, we have no testimony to offer because, we submit with all respect, that the subject matter under consideration here, the issues which are raised by the order of Division Four, are matters not within the jurisdiction of the Commission and we desire to preserve our right to challenge the Commission's jurisdiction and obtain adjudication on that, first, we hope, by the Commission. As I say, we have filed our reconsideration of the Commission's order overruling our motion or for the postponement of this proceeding until, in some other way in which it may deem appropriate, the Commission may pass upon that jurisdictional question.

Commr. PORTER. Do Counsel for intervenors or any other Counsel care to file briefs with the Commission prior to our determination of the matter?

Mr. MCCOLLESTER. Well, Mr. Commissioner, so far as the applicant is concerned, I am in somewhat of a quand'ry to know how to reply to your inquiry on that. We would like to file a brief with the Commission on the jurisdictional question. So would the intervenors.

402 Commr. PORTER. Well, understand, Mr. McCollester, now, this hearing, of which I have recited in the record the various notices you have had and the purpose of it, and have also called your attention now to the matters that the Commission will consider, whatever it decides to do, and I do not know what the Commission is going to do, of course, or the division first, I may say. This matter goes first to Division Four, of course, with rights under the rules for reconsideration later by the entire Commission if anybody is dissatisfied. But I want to offer Counsel opportunity to file briefs on any question now that they desire prior to the issuance of any order or certificate additional to what we have already offered, if you care to avail yourselves of that right.

Mr. MCCOLLESTER. Well, Mr. Commissioner, we do desire to file a brief, not on the merits, not on the facts at all, because we do not concede that the Commission has jurisdiction to go into those at this time, not upon the issue which may be a very vital issue and is of great concern, I know, to some carriers as well as to Seatrain, namely as to the authority of the Commission to

specify the types of vessels which a water carrier may use, or the manner in which it may conduct its service, but in order not to confuse the issues and fail to obtain a determination of the issue which my client deems so extremely vital, namely, the permanence of certificate such as the ones issued, we would prefer to confine our brief to that latter point.

403 Commr. PORTER. Well of course, I say frankly now that it isn't my province to say what character brief you should file. May I say that in my judgment the whole question is here now, and you may file briefs, of course, discussing any of the questions that you consider or want the Commission to consider in the determination of this matter and the issuance of an order that, in my judgment, you might be able to appeal from, if you desire.

Mr. MCCOLLESTER. Well, Mr. Commissioner, I appreciate your point of view on that. May I recall to you that we have this petition on file, which is a petition, I think, addressed to the Commission, and since it is to reconsider the Commission's ruling overruling our previous motion, I assume that it is one for the Commission to pass upon.

Commr. PORTER. It may do that at the same time that it passes on the final question, Mr. McCollester. I will say that in all fairness to you.

Mr. MCCOLLESTER. I appreciate that; but, Mr. Commissioner, I am interested in a speedy and orderly determination.

Now I hope Your Honor will not consider that I am criticising the Commission in the handling of the matter, but we have had some experience in some of the Seatrain cases which have made my client a little bit wary, perhaps, of having issues confused by having thrown into consideration several different issues.

Now the issue before the Commission of the Commission's
404 authority to revoke or modify rights which have become effective——

Commr. PORTER. May I just ask——

Mr. MCCOLLESTER. May I just finish?

Commr. PORTER. All right.

Mr. MCCOLLESTER. Is a very simple issue. It would seem, and with all due respect, we would ask, that that issue of law be determined.

Commr. PORTER. Will you tell me any way on earth that it can be determined—and you have a right to take it to the Courts—except in the method in which I am proceeding today? I would like to be advised now, if you know any any way. Do you mean to say that if the Commission, Mr. McCollester, should overrule the motion that you say you have filed, that you could appeal that to the Courts?

Mr. McCollester. Well, Mr. Commissioner, we might be satisfied with a ruling of the Commission on the point.

Commr. Porter. Well, you might not be, you know, and if you are not, how could you appeal from that ruling of the Commission?

Mr. McCollester. Our situation is this: If the Commission——

Commr. Porter. But I am not here to tell you what to do. I am not advising you; you don't need any advice from me.

Mr. McCollester. Well, I am not sure about that; in fact I feel quite to the contrary, but if the Commission should
405 overrule our motion again, and hold that it has jurisdiction, then we would be confronted with the question whether we should present facts to the Commission to support the certificates as granted or whether we have other means of handling the matter.

Commr. Porter. Well, you were notified, may I say, the Respondent was duly notified that your former motion was overruled by me as presiding Commissioner, and that my ruling was sustained by the entire Commission, without prejudice to you to renew it at any time in the future that you see fit to so do, of course.

Mr. McCollester. Oh, yes. Since that time, of course, the Commission will understand that there have been other lines intervene.

Commr. Porter. I appreciate that.

Mr. McCollester. As I told the Commission before, we are not entirely acting on our own here; we are under some pressure from some other lines, which are very much concerned with the question, and for that reason we have filed this request for reconsideration.

Commr. Porter. Well, we will not gain anything, Mr. Collester, by prolonging our discussion; how long do you want to file whatever character briefs you care to file in this matter?

Mr. McCollester. I can do it quickly. I don't know about the intervenors.

Commr. Porter. Well, I am asking you, first; how long
406 do you want, Mr. McCollester?

Mr. McCollester. Twenty days.

Commr. Porter. Does anybody else desire any longer time? (No response.)

Commr. Porter. Very well. Briefs may be filed by all the parties on or before May 16th, 1944. Of course Counsel, I suppose, will make known in their briefs whether they desire oral argument or not under the rules of the Commission.

Mr. McCollester. That's right.

Commr. Porter. Very well; this record stands closed.

(Whereupon, at 10:30 A. M., the hearing in the above-entitled matter was closed.)

407 Intervention granted at hearing on Apr. 24, 1944, D. T. C.

Before the Interstate Commerce Commission

Docket W-543

SEATRAIN LINES, INC., COMMON CARRIER APPLICATION

Petition of Ocean Steamship Company of Savannah for leave to intervene

Comes now your petitioner, Ocean Steamship Company of Savannah and respectfully represents that it has an interest in the above entitled proceeding and that it desires to intervene in and become a party to said proceeding, and for grounds of the proposed intervention says:

1. Petitioner is a corporation organized under laws of the State of Georgia. Its principal office is at Pier 46, North River, New York, N. Y. It holds certificate of public convenience and necessity No. W-274 granted by the Interstate Commerce Commission, Division 4, on the 29th day of October A. D. 1941 for continuation of operation as a common carrier by self-propelled ocean going ships in interstate or foreign commerce, in the transportation of passengers and commodities generally between the ports of Savannah, Ga., New York, N. Y., and Boston, Mass., by way of the Atlantic Ocean, or by way of the Atlantic Ocean, East River and Long Island Sound, or Cape Cod Canal.

2. Petitioner has an interest in this proceeding because it is informed that there is involved the question as to the authority of the Commission to modify or revoke a certificate which has been granted and become effective and the decision herein may become a precedent which will govern the Commission's decisions with regard to other certificates.

408 3. This petition does not broaden the issues raised by the complaint.

Wherefore Ocean Steamship Company of Savannah prays leave to intervene and be treated as a party hereto with the right to have notice of and appear at the taking of testimony, produce and cross-examine witnesses, and be heard in person or by counsel upon brief and at the oral argument if oral argument is granted.

Respectfully submitted.

OCEAN STEAMSHIP COMPANY OF SAVANNAH,
T. N. COOK,
Vice President and General Manager.

Dated at New York, N. Y., April 19, 1944.

[Verification omitted.]

409 Intervention granted at hearing held on 4/24/44. D. T. C.
Before the Interstate Commerce Commission

Docket No. W-543

SEATRAIN LINES, INC., COMMON CARRIER APPLICATION

Petition of Agwilines, Inc. (Clyde-Mallory Lines) for leave to intervene

Comes now your petitioner, Agwilines, Inc. (Clyde-Mallory Lines), a corporation organized under the laws of the State of Maine, with principal offices at Pier 34, North River, New York, N. Y., and respectfully represents that it has an interest in the above-entitled proceeding and that it desires to intervene in and become a party to said proceeding, and for grounds of the proposed intervention says:

1. It holds a certificate of public convenience and necessity, No. W-491, issued by Division 4 of the Interstate Commerce Commission, June 18, 1942, for continuation of operation as a common carrier by self-propelled vessels in coastwise service between the ports of Boston, Mass., New York, N. Y., Charleston, S. C., Jacksonville, Miami, Tampa and Key West, Fla., and Houston, Texas.

2. Petitioner has an interest in this proceeding because it is informed that there is involved the question as to the authority of the Commission to modify or revoke a certificate which has been granted and become effective and the decision herein may become a precedent which will govern the Commission's decisions with regard to other certificates.

3. This petition does not broaden the issues raised by the complaint.

Wherefore, Agwilines, Inc. (Clyde-Mallory Lines) prays leave to intervene and be treated as a party hereto with the right
410 to have notice of and appear at the taking of testimony, produce and cross-examine witnesses, and be heard in person or by counsel upon brief and at the oral argument if oral argument is granted.

Respectfully submitted.

AGWILINES, INC. (CLYDE-MALLORY LINES).
By Geo. J. Horner,
GEO J. HORNER,
Assistant to Vice President.

Dated at New York, N. Y., April 20th, 1944.

[Verification omitted.]

411 Intervention granted at hearing on 4/24/44. D. T. C.

Before the Interstate Commerce Commission

Docket W-543

SEATRAIN LINES, INC., COMMON CARRIER APPLICATION

Petition of Eastern Steamship Lines, Inc. for leave to intervene

Comes now your petitioner, Eastern Steamship Lines, Inc. and respectfully represents that it has an interest in the above entitled proceeding and that it desires to intervene in and become a party to said proceeding, and for grounds of the proposed intervention says:

1. Petitioner is a corporation organized under laws of the State of Maine. Its principal office is at No. 40 Central Street, Boston, Mass. It holds certificate of public convenience and necessity No. W-311 granted by the Interstate Commerce Commission, Division 4, on the 19th day of January A. D. 1942 for continuation of operation as a common carrier by self-propelled vessels in interstate or foreign commerce, in the transportation of passengers and commodities generally between the ports of Portland, Maine, Boston, Mass., New York, N. Y., and Norfolk, Va., by way of the Atlantic Ocean, around Cape Cod or through Cape Cod Canal, Long Island Sound, the East and North Rivers between Portland, Boston and New York, and by way of the Atlantic Ocean, Hampton Roads and the Elizabeth River, between New York and Norfolk; and in the transportation of commodities generally between New York, Newport News, Hopewell and Richmond, Va., by way of the Atlantic Ocean, Hampton Roads and the James River.

412 2. Petitioner has an interest in this proceeding because it is informed that there is involved the question as to the authority of the Commission to modify or revoke a certificate which has been granted and become effective and the decision herein may become a precedent which will govern the Commission's decisions with regard to other certificates.

3. This petition does not broaden the issues raised by the complaint.

Wherefore Eastern Steamship Lines, Inc. prays leave to intervene and be treated as a party hereto with the right to have notice of and appear at the taking of testimony, produce and cross-

examine witnesses, and be heard in person or by counsel upon brief and at the oral argument if oral argument is granted.

Respectfully submitted.

EASTERN STEAMSHIP LINES, INC.,
J. L. RIDLEY,
Freight Traffic Manager.

Dated at New York, N. Y., April 18, 1944.

[Verification omitted.]

413 Intervention granted at hearing on 4/24/44. D. T. C.

Before the Interstate Commerce Commission

Docket No. W-543

SEATRAIN LINES, INC., COMMON CARRIER APPLICATION

Petition for leave to intervene

Comes now your petitioner, the Bull Steamship Line, and respectfully represents that it has an interest in the matters in controversy in the above-entitled proceeding and desires to intervene in and become a party to said proceeding, and for grounds of the proposed intervention says:

I. Petitioner is a New Jersey corporation which holds a Certificate issued to it by this Commission under date of June 3, 1942, as a Common Carrier by water of commodities generally between certain North and South Atlantic and Gulf ports.

II. In the instant Docket the Commission has reopened the proceedings wherein Seatrain Lines, Inc. was granted a Certificate as a Common Carrier by water. Petitioner is advised that the purpose of the reopening is to consider whether the original Certificate was too broad in that it did not limit the carrier to transportation of commodities in railroad cars carried by "Seatrain" type vessels and exclude any authority to transport generally in the usual type of ocean-going vessel. Petitioner, as the holder of a Certificate, is interested in the issue as to whether a Certificate duly granted and permitted to become effective may thereafter be reconsidered by the Commission upon the question whether the authority originally granted was too broad. Such principle, if established, would leave Petitioner and all others similarly situated in suspense as to the scope of their authority, with consequent inability to plan their future operations. Petitioner contends that, as a matter of statutory construction and sound policy a Certificate duly issued and effective is final

414 as to the scope of authority therein contained.

Wherefore, petitioner respectfully prays leave to intervene and be treated as a party hereto with the right to have notice

of and appear at the taking of any further testimony, introduce evidence upon any rehearing, produce and cross-examine witnesses and be heard in person or by counsel in brief or oral argument if oral argument is granted.

Dated at New York, April 19, 1944.

E. Myron Bull,
E. MYRON BULL,
Attorney for Petitioner.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding by mailing by first class mail a copy thereof, properly addressed to each other party.

Dated at New York this 19th day of April 1944.

E. Myron Bull,
E. MYRON BULL, *Attorney.*

415 *Order*

At a General Session of the Interstate Commerce Commission, held at its office at Washington, D. C., on the 8th day of May, A. D. 1944.

No. W-543

SEATRAIN LINES INC., COMMON CARRIER APPLICATIONS

Upon further consideration of the record in the above-entitled proceeding and of petition dated April 21, 1944, filed by applicant for reconsideration of the Commission's order of April 3, 1944, overruling applicant's motion for vacation or rescission of the order of Division 4 entered under date of January 27, 1944, reopening the proceeding for hearing, or in lieu thereof for postponement of further proceedings pending consideration and determination of authority of the Commission to revoke or modify operating rights or privileges granted by certificate which has been issued and become effective:

It is ordered, That the said petition be, and it is hereby, denied.

By the Commission:

[SEAL]

W. P. Bartel,
W. P. BARTEL, *Secretary.*

443 *Order*

Interstate Commerce Commission

Docket No. W-543

SEATRAIN LINES, INC., COMMON CARRIER APPLICATION

In the matter of request for the postponement of the effective date of the order in the above-entitled proceeding.

Present: CLAUDE R. PORTER, Commissioner, to whom the above-entitled matter has been assigned for action thereon.

Upon further consideration of the record in the above-entitled case, and upon request of the United States District Court for the District of Delaware.

It is ordered, That the certificate and order entered by the Commission in this case on February 6, 1945, which by its terms was to become effective May 21, 1945, be, and it is hereby, extended to August 21, 1945.

Dated at Washington, D. C., on this 11th day of May 1945.

By the Commission, Commissioner Porter.

[SEAL] W. P. BARTEL, *Secretary.*

444 *Certificate of public convenience and necessity*

At a Session of the Interstate Commerce Commission, Division 4, held at its office in Washington, D. C., on the 17th day of December, A. D. 1941

No. W-819

SOUTHERN STEAMSHIP COMPANY COMMON CARRIER APPLICATION

The Southern Steamship Company, having filed application under the provisions of section 309 (a) of the Interstate Commerce Act for a certificate of public convenience and necessity authorizing continuance of operation as a common carrier by water, in interstate or foreign commerce, as specified below; and having shown that it was in bona fide operation on January 1, 1940, in the performance of such transportation, and has continued the operation since that time; and the division so finding, therefore:

It is hereby certified, That public convenience and necessity require the continuation of operation by the Southern Steamship Company as a common carrier by self-propelled vessels, in interstate or foreign commerce, in the transportation of commodities generally between the ports of Philadelphia, Pa., and Houston, Tex., by way of the Delaware River and Delaware Bay, the Atlantic Ocean, and the Gulf of Mexico.

It is ordered, That said carrier be, and it is hereby, authorized to perform the service specified above, subject, however, to such

terms, conditions, and limitations as are now, or may hereafter be, attached to the exercise of such authority.

It is further ordered, That the holding of this certificate by said carrier be, and it is hereby, conditioned upon the exercise of authority specified above, and upon compliance by said carrier with the requirements of the Interstate Commerce Act and the orders, rules and regulations of the Commission thereunder.

And it is further ordered, That this certificate shall take effect and be in force from and after 45 days from its date.

By the Commission, division 4.

[SEAL] W. P. Bartel,
W. P. BARTEL, *Secretary.*

445 Interstate Commerce Commission

No. W-521

THE BULL STEAMSHIP LINE COMMON CARRIER APPLICATION

Submitted December 4, 1941. Decided June 3, 1942

Applicant found entitled to continue operation as a common carrier by self-propelled vessels in the transportation of commodities generally, between certain named ports on the Atlantic and Gulf coasts, by reason of its having been engaged in such operation on January 1, 1940, and continuously since. Certificate issued, and application for a certificate in all other respects denied.

E. Myron Bull for applicant.

Stanley Carpenter, Wm. H. Delaney, George J. Harner, L. A. Parish, Alexander Gawlis, and W. H. Hickman for protestants.

Report of the Commission

Division 4, Commissioners PORTER, MAHAFFIE, and MILLER

By Division 4:

By application filed May 27, 1941, The Bull Steamship Line, a New Jersey corporation, seeks a certificate of public convenience and necessity under the provisions of section 309 (a) of the Interstate Commerce Act authorizing continuance of operations as a common carrier by water, in interstate or foreign commerce, in the transportation of commodities generally between New York, N. Y., Port Newark, N. J., Baltimore, Md., Charleston, S. C., Jacksonville, Fort Pierce, Miami, Tampa, St. Petersburg, Port St. Joe, and Pensacola Fla., and Beaumont and Corpus Christi, Tex. A hearing was held, at which interested parties appeared in opposition to the application but introduced no evidence. Appearances

were entered in behalf of rail carriers in official and southern territories, the Agwilines, Inc. (Clyde-Mallory Lines), the
446 Pan-Atlantic Steamship Corporation, the Merchants and Miners Transportation Company, and the Ocean Steamship Company of Savannah.

Under section 309 (a), applicant is entitled to a certificate of public convenience and necessity upon a showing that it was in bona fide operation on January 1, 1940, and has so operated since that time except as to interruptions of service over which it had no control.

The Bull Steamship Line is a wholly owned subsidiary of the A. H. Bull Steamship Company, which also owns the Ericsson Line, applicant in No. W–657 for a common-carrier certificate, and the Baltimore Insular Line, Inc., applicant in No. W–514 for a permit as a contract carrier.

Applicant has operated as a common carrier since 1915. In 1929, it acquired the assets of the Baltimore & Carolina Steamship Company, then in operation between various ports on the Atlantic and Gulf coasts, since which time it has maintained substantially the same services. On January 1, 1940, applicant was operating eight ships with an aggregate of approximately 46,000 dead-weight tons, all of which were chartered from the parent company. Diversions to the shipping pool of the United States Maritime Commisison for national defense purposes, made since June 1941, had reduced applicant's fleet at the time of hearing to five ships aggregating about 25,000 dead-weight tons.

Since prior to January 1, 1940, with certain exceptions hereinafter described, applicant has maintained regularly scheduled services as a common carrier of general commodities, which on the "grandfather" date and during the early part of 1940 were as follows: South-bound, from Baltimore to Charleston, Jacksonville, and Miami, and from New York, Port Newark, and Baltimore to Fort Pierce, Tampa, St. Petersburg, Port St. Joe, Pensacola, Lake Charles, La., Beaumont, and Corpus Christi; and, northbound, from Miami and Jacksonville to Baltimore, and from Corpus Christi, Beaumont, Lake Charles, Pensacola, Port St. Joe, Tampa, Miami, Fort Pierce, and Jacksonville to Baltimore, New York, and Port Newark. Traffic was handled between intermediate ports on the described routes.

South-bound, cargo is loaded at New York, Port Newark, and Baltimore, and cargo is picked up and delivered at Charleston, Jacksonville, Fort Pierce, and the other ports. North-bound, cargo is picked up and delivered at all ports except that no cargo is handled between New York Harbor and Baltimore. Applicant seeks no authority to handle traffic between the latter points.

Although applicant has maintained no service between New

York Harbor and south Atlantic ports other than Fort Pierce since the "grandfather" date, it regards the entire operation as one route and seeks authority to serve all of the ports named in the application, except as indicated above, in any combination of origin, destination, and intermediate calls. Section 309 (a) requires a showing of more than a potential ability to perform operations on and continuously since January 1, 1940. Applicant must have actually been engaged in such operation before it is entitled to the authority sought. McDonald v. Thompson, 305 U. S. 263, 266. Here, applicant admits that it had not handled traffic between New York Harbor and south Atlantic ports other than Fort Pierce since the "grandfather" date.

447

During 1940, applicant voluntarily abandoned service to and from Lake Charles, between Beaumont and Pensacola, and between Beaumont and Port Newark. Service to and from Beaumont, however, was resumed several months later. From and to the other ports named above, operation was continuous until about June 1941, when some involuntary curtailments resulted from the diversion of some of applicant's vessels to the Maritime Commission. Such curtailments, therefore, were beyond applicant's control. Because of this diversion, the remaining vessels were not, at the time of the hearing, held to strict itineraries, their operation being conducted so as to meet the greatest needs. To the extent that applicant's operations have not been continuous since the "grandfather" date, because of voluntary abandonments, the application will be denied.

Applicant holds itself out to the public to transport commodities generally and has so operated both south-bound and north-bound. Its annual reports, filed with this Commission, for many years, show the volumes of traffic handled to and from the aforementioned ports. For 1940, the total exceeded 1,000,000 tons. Applicant has handled a substantial quantity of citrus fruit north-bound, principally from Fort Pierce to New York. Other commodities such as canned citrus fruits and miscellaneous canned goods have been picked up at Fort Pierce, Miami, and Jacksonville, Canned citrus fruit is the principal commodity obtained at Tampa and that at Port St. Joe is paper. Traffic from Beaumont and Corpus Christi consists principally of agricultural products and salt. The diversity of commodities moving between the named ports is greater south-bound than north-bound.

Applicant has joint arrangements with railroads and motor carriers for the through movement of traffic and has filed its through rates with this Commission. It also has on file tariffs naming rates to and from the ports covered by the application.

Since the hearing, applicant has suspended all services covered by its application and authorized by this report. This interrup-

tion to service was caused by the fact that the United States Government has taken applicant's vessels for operations essen-
448 tial to the war. Applicant has submitted satisfactory evidence that the vessels were so taken by the Government. Such interruption to service is beyond the control of the applicant within the meaning of the provisions of section 309 (a) of the act.

We find that applicant was on January 1, 1940, and continuously since has been, in bona fide operation as a common carrier by self-propelled vessels, in interstate or foreign commerce, of general commodities (a) between New York Harbor and the ports of Fort Pierce, Tampa, St. Petersburg, Port St. Joe, Pensacola, and Corpus Christi, (b) between Baltimore and the ports of Charleston, Jacksonville, Fort Pierce, Miami, Tampa, St. Petersburg, Port St. Joe, Pensacola, Beaumont, and Corpus Christi, and (c) between the ports of Charleston, Jacksonville, Fort Pierce, Miami, Tampa, St. Petersburg, Port St. Joe, Pensacola, Beaumont, and Corpus Christi, except for interruptions to service beyond the control of the applicant, and except that applicant did not so operate between Beaumont and Pensacola; and that applicant is entitled to a certificate authorizing continuance of such operation, subject, however, to general conditions which are necessary to carry out, with respect to the continuation of applicant's operations, the requirements of part III of the act, and the orders, rules, and regulations of the Commission thereunder.

The application except to the extent that a certificate is herein granted will be denied.

An appropriate certificate and order will be issued.

449 *Certificate and order*

At a Session of the Interstate Commerce Commission, Division 4, held at its office in Washington, D. C., on the 3rd day of June, A. D. 1942

No. W—521

THE BULL STEAMSHIP LINE COMMON CARRIER APPLICATION

The Bull Steamship Line having filed an application under the provisions of section 309 (a) of the Interstate Commerce Act for a certificate to continue operations as a common carrier by water, a hearing having been held, and full investigation of the matters and things involved having been made, and said division, on the date hereof, having made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is hereby certified, That public convenience and necessity

require the continuation of operation by applicant as a common carrier, by self-propelled vessels, in interstate or foreign commerce, in the transportation of commodities generally (a) Between New York Harbor and the ports of Fort Pierce, Tampa, St. Petersburg, Port St. Joe and Pensacola, Fla., and Corpus Christi, Tex., (b) between Baltimore, Md., and the ports of Charleston, S. C., Jacksonville, Fort Pierce, Miami, Tampa, St. Petersburg, Port St. Joe, and Pensacola, Fla., and Beaumont and Corpus Christi, Tex., and (c) between the ports of Charleston, Jacksonville, Fort Pierce, Miami, Tampa, St. Petersburg, Port St. Joe, Pensacola, Beaumont and Corpus Christi, except between Beaumont and Pensacola.

It is ordered, That said carrier be, and it is hereby, authorized to perform the service specified above, subject, however, to such terms, conditions, and limitations as are now, or may hereafter be, attached to the exercise of such authority.

It is further ordered, That the holding of this certificate by said carrier be, and it is hereby, conditioned upon the exercise of the authority specified above, and upon compliance by said carrier with the requirements of the Interstate Commerce Act, and the orders, rules, and regulations of the Commission thereunder.

It is further ordered, That said application, except to the extent granted in said report, be, and it is hereby, denied.

And it is further ordered, That this certificate and order shall take effect and be in force from and after July 10, 1942.

By the Commission, division 4.

[SEAL] W. P. BARTEL, *Secretary*.

450 Interstate Commerce Commission

No. W-376

PAN-ATLANTIC STEAMSHIP CORPORATION COMMON CARRIER APPLICATION

Submitted May 13, 1942. Decided June 15, 1942

Applicant found entitled to continue operation as a common carrier by self-propelled vessels in the transportation of passengers and commodities generally between certain named ports on the Atlantic and Gulf coasts, by reason of its having been engaged in such operation on January 1, 1940, and continuously since. Certificate of public convenience and necessity issued, and application in other respects denied.

M. G. de Quevedo for applicant.

A. R. Eldred, A. P. Donadio, F. X. Masterson, Wm. H. Delaney, Chas. P. Reynolds, George J. Horner, E. B. Wright, and Alexander Gawlis for protestants.

Report of the Commission

Division 4, Commissioners PORTER, MAHAFFIE, and MILLER

By Division 4:

Exceptions to the report proposed by the examiner were filed by applicant and certain protestants, and the proceeding was argued orally.

By application filed May 26, 1941, as amended, Pan-Atlantic Steamship Corporation, of Mobile, Ala., seeks a certificate of public convenience and necessity under the provisions of section 309 (a) of the Interstate Commerce Act, authorizing continuance of operation, in interstate or foreign commerce, as a common carrier by water, in the transportation of passengers and property generally between Atlantic coast ports and ports on the Gulf of Mexico; between Atlantic coast ports; and between Gulf ports. Representatives of rail carriers in official and southern territories opposed the granting of the certificate but offered no testimony. Agwilines, Inc. (Clyde-Mallory Lines), Eastern Steamship Lines, Inc., Merchants and Miners Transportation Company, and Ocean Steamship Company of Savannah, carriers by water, opposed granting any authority to operate between North Atlantic ports or from New York, N. Y., to Tampa, Fla., direct. The Bull Steamship Line opposes the grant of operating rights to and from Baltimore, Md.

Applicant is wholly controlled by the Waterman Steamship Corporation, of Mobile. As of the date of the application
451 and date of hearing, October 17–18, 1941, applicant owned 9 steamships, of which 4 were chartered to its parent company and 5 were operated in the services hereinafter discussed, together with 6 other vessels chartered from Waterman Steamship Corporation. The 11 vessels operated by applicant average between 8,500 and 9,000 dead-weight tons.

The application, as amended, is for authority to operate over 4 regular routes, designated as routes A, B, C, and D, and 3 irregular routes, E, F, and G. The number of revenue calls made between January 1, 1940, and May 23, 1941, the date of the application, at all ports, were as follows: Baltimore, Md., 1; Boston, Mass, 69; Georgetown, S. C., 63; Hoboken, N. J., 63; Mobile, Ala., 138; New Bedford, Mass., 7; New Orleans, La., 191; New York, N. Y., 80; Panama City, Fla., 132; Philadelphia, Pa., and Camden, N. J., 81; and Tampa, Fla., 176.

Applicant began operation in the fall of 1933, or early in 1934, on route A, between New Orleans, Mobile, Panama City, and Tampa, on the one hand, and Boston, New York Harbor, as defined in Ex Parte No. 140, Determination of the Limits of New York

Harbor and Harbors Contiguous Thereto, and Philadelphia, on the other. In August 1937, this route was extended to include Georgetown. Service has been continuous since inauguration, and, since August 1937, sailings have been at weekly intervals. At the time of hearing, applicant was operating direct sailings from Tampa to New York north-bound. South-bound traffic had been transported directly from New York to Tampa until September 18, 1940, without stops at any other port. Since then, south-bound vessels containing cargo for Tampa either have gone to New Orleans and other Gulf ports before reaching Tampa, or the Tampa cargo has been transshipped at New Orleans. Although its witness believed that on several occasions since September 18, 1940, its vessels had made the run from New York to Tampa without stopping at any other port, "due to conditions of today, the boats are operating the other way."

Protestant water carirers therefore urge that applicant is not entitled to a certificate to operate from New York to Tampa directly. However, the fact that maintenance of direct sailings from New York to Tampa has been interrupted by applicant does not alter the fact that applicant was in bona fide operation as a common carrier by water on January 1, 1940, between these ports with respect to which application is made and has so operated since that time.

Route B, between New Orleans, Mobile, Panama City, and Tampa also was started in 1933 or 1934, and has been served continuously. Between New Orleans and Tampa, direct, applicant maintains a weekly service, while on the route between New Orleans, Mobile, Panama City, and Tampa the service is twice weekly.

452 Service over route C, between Georgetown and New York Harbor, began in August 1937, since which time sailings have been weekly.

Route D is between Philadelphia, New York Harbor, and Boston. Schedules of maximum rates between these ports were filed in 1933 or 1934 as required by the Shipping Act of 1916. Schedules of actual rates were filed with the United States Maritime Commission in 1939, since which time applicant has been holding itself out as a common carrier of freight between those ports. Its rates apply strictly from dock to dock, and because of such rates and the competition of other carriers, some of whose rates include pick-up and delivery service, Pan-Atlantic has been unable to secure much traffic. Its vice president and general manager did not know of any traffic handled between Philadelphia and New York, either north-bound or south-bound, since January 1, 1940; he believed no local traffic had been carried in either direction between New York and Boston since January 1, 1940;

and he did not know whether any local traffic had been handled either from Boston to Philadelphia or from Philadelphia to Boston during the same period. Applicant has named rates for transportation between the North Atlantic ports in order to be able to handle reconsignments of cargo.

Irregular route E is between New Orleans, Mobile, and Panama City, on the one hand, and Camden, New Bedford, and Baltimore, on the other; also between Tampa and New Bedford and Camden. Applicant served Camden weekly for a number of years until some time in January 1941, when it placed an embargo against this port. New Bedford had been served regularly each week from July 24, 1934, until the spring of 1940, when that port was also embargoed by applicant. On September 22, 1941, a Pan-Atlantic steamer loaded at New Bedford for New Orleans, Mobile, Panama City, and Tampa, but the embargo was in effect on the hearing date, October 17, 1941. Interruptions of service thus brought about being clearly those over which applicant had control, no authority under section 309 (a) to serve Camden and New Bedford will be granted.

Applicant included Baltimore in this irregular route because its major service is in connection with the Ericsson Line, a carrier by water. This is a joint service operated since October 27, 1934, north-bound and south-bound, and weekly sailings have been made since 1937. Cargoes were transshipped at Camden until that port was embargoed by applicant in January 1941; thereafter transshipment has been at Philadelphia. In addition to the joint service, one steamer of applicant called at Baltimore in 1940, one called on September 26, 1941, and another was due there October 18, 1941, all of which vessels were handling cargo
453 to Gulf ports other than Tampa, and additional direct calls at Baltimore were expected to be made. A somewhat comparable situation, insofar as transshipment service is concerned, was before us in United States Lines Co. Common Carrier Application, 250 I. C. C. 229. There we said:

"Applicant is not claiming 'grandfather' rights to serve by direct call the ports which it has heretofore only served by transshipment arrangements with other water carriers, but it does desire to continue its transshipment service to such Pacific coast ports. It is unnecessary to include transshipment service to or from ports not directly served in any common-carrier operating authority, since, under the provisions of section 305 (b) of the act, it is the duty of common carriers by water to establish reasonable through routes with other such carriers and with common carriers by railroad."

A few occasional direct calls disclosed of record do not establish that applicant was in bona fide operation as a common carrier by

water on January 1, 1940, between Baltimore and New Orleans, Mobile, and Panama City and that it has so operated since that time.

Irregular route F includes Boston, New Bedford, New York Harbor, Camden, and Philadelphia. During 1940, applicant's vessels made seven trips between New Bedford and Philadelphia and one in September 1941 from New Bedford to Philadelphia with in-bound and out-bound freight, but no local traffic was carried in either direction. None of applicant's vessels went from Philadelphia to New Bedford in 1941.

Irregular route G. is between Georgetown, and Philadelphia, Camden, New Bedford, and Boston. Applicant's only evidence of any operation on this route was of a vessel carrying cargo from Georgetown to Philadelphia in October 1941. Because Pan-Atlantic then had no dock space available at the latter point, this vessel was sent to Camden, where the Philadelphia cargo was discharged.

The principal commodities transported by applicant are canned goods, sugar, rice, salt, naval stores, cotton, paper and paper products, grain, and grain products, iron and steel articles, paint, automobile tires, soap, lumber, pulpboard, woodpulp, and "everything from A to Z in the classification." A large volume of applicant's total business consists of traffic interchanged with railroads motortruck lines, and other boat lines in official and southern territories.

Scheduled sailings are all subject to change and substitution without notice. In March 1939, applicant's vessels went from the Gulf to New York, New Bedford, Boston, New York, and then to Philadelphia. As of January 1, 1940, north-bound vessels went first to Philadelphia, then to Boston, and back to Philadelphia. In March 1940, the vessels called first at Philadelphia, then New York, then Boston, and back to Philadelphia. In September 1940, north-bound vessels called first at Philadelphia and then at
454 Boston. In April 1941, vessels went from Tampa to Boston and then to Philadelphia. In August 1941, the rotation of calls was Boston, New York, and Philadelphia, regularly every third week. In early October 1941, a vessel listed to go to New York was routed to Boston, New York, and Philadelphia. Conditions were such that the ship actually proceeded from Boston to Philadelphia and then back to New York. It is the practice of applicant either to send the vessels from the Gulf ports directly to Philadelphia and then into New York and to Boston, or directly to Boston and then to Philadelphia, or directly to Boston and then to New York. The frequent changes in scheduled operations are deemed necessary to enable applicant to give maximum efficiency and service to the public and are said to demonstrate the need for a certificate of such character as to

leave the rotation or order of ports for loading and unloading to the business judgment of applicant. We will authorize continuation of such operations, but without restriction to the regular and irregular routes outlined by the application. The routing of vessels between the various ports is an operating problem which should be left to applicant's management, subject to whatever regulatory powers the Commission may exercise.

Although applicant has not carried any local traffic between the north Atlantic ports since January 1, 1940, it contends it is entitled to authority to perform the service because it has always held itself out to engage in such operations if the traffic were offered. Considering that applicant, on and since January 1, 1940, has operated its vessels regularly between those ports and has maintained rates applicable on local traffic, the fact that it has not secured any of that traffic should not preclude a finding that applicant was in bona fide operation on and since that date between such ports and is entitled to continue the service.

Applicant's transshipment service in connection with the Ericsson Line is a freight service only and is operated under joint rates on file with this Commission. All other tariffs to which applicant is a party, including its tariff of passenger fares, are likewise so filed. Applicant also has filed Annual Report Form K for carriers by water with this Commission from 1934 through December 31, 1940.

Applicant is not asking for the right to transport passengers between Boston, New Bedford, New York Harbor, and Philadelphia Harbor, but does seek the right to carry them between all the other points named, except Baltimore. Applicant has had no passenger traffic between the north Atlantic ports since January 1, 1940. It made no showing of any passenger movements between any of the other ports during any period but relied upon the fact that its annual reports to the Commission contain details of
455 its passenger business. There was no opposition to applicant's carrying passengers in the coastwise trade, and continuance of such transportation will be authorized.

Since the date of the hearing, applicant has been forced to suspend all service. Satisfactory evidence has been submitted that applicant's vessels have been taken by the United States Government for use in transportation necessary to the prosecution of the war. The resulting interruption of service is beyond the control of the carrier within the meaning of section 309 (a) of the act.

We find that the Pan-Atlantic Steamship Corporation was in bona fide operation on January 1, 1940, as a common carrier by self-propelled vessels, in interstate or foreign commerce, in the transportation of passengers and commodities generally, between Boston, New York Harbor, Philadelphia, Georgetown, New Or-

leans, Mobile, Panama City, and Tampa; that such operations have been continued since that date, except for interruption beyond the control of applicant; and that applicant is entitled to a certificate of public convenience and necessity authorizing continuance of such operations, subject, however, to general conditions which are necessary to carry out, with respect to the continuation of applicant's operations, the requirements of part III of the act, and the orders, rules, and regulations of the Commission thereunder.

The application, except to the extent that a certificate is herein granted, will be denied.

An appropriate certificate and order will be issued.

MILLER, Commissioner, dissenting in part:

I dissent with respect to that portion of the report of the majority which grants applicant "grandfather" authority to serve Boston, operate locally between the north Atlantic ports, and transport passengers between all ports specified therein. In my opinion, applicant is not entitled to such authority because there is no showing in the record that it has so operated on and since January 1, 1940, as is required by section 309 (a).

456 *Certificate and order*

At a Session of the Interstate Commerce Commission, Division 4, held at its office in Washington, D. C., on the 15th day of June A. D. 1942

No. W-376

Pan-Atlantic Steamship Corporation Common Carrier Application

Pan-Atlantic Steamship Corporation having filed an application under the provisions of section 309(a) of the Interstate Commerce Act for a certificate of public convenience and necessity authorizing continuation of its operations as a common carrier by water, a hearing having been held, and full investigation of the matters and things involved having been made, and said division, on the date hereof, having made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is hereby certified, That public convenience and necessity require the continuation of operations by Pan-Atlantic Steamship Corporation, as a common carrier by self-propelled vessels, in interstate or foreign commerce, in the transportation of passengers and commodities generally between Boston, Mass., New York Harbor, Philadelphia, Pa., Georgetown, S. C., New Orleans, La., Mobile, Ala., Panama City, Fla., and Tampa, Fla.

It is ordered, That said carrier be, and it is hereby, authorized to perform the service specified above; subject, however, to such terms, conditions and limitations as are now, or as may hereafter be attached to the exercise of such authority by this Commission.

It is further ordered, That the holding of this certificate by said carrier be, and it is hereby, conditioned upon the exercise of the authority specified above, and upon compliance by said carrier with the requirements of the Interstate Commerce Act, and the orders, rules, and regulations of the Commission thereunder.

It is further ordered, That said application except to the extent granted in said report, be, and it is hereby, denied.

And be it further ordered, That this certificate and order shall take effect and be in force from and after July 24, 1942.

By the Commission, division 4.

W. P. Bartel,

[SEAL] W. P. BARTEL, *Secretary.*

457 Interstate Commerce Commission

No. W-352

SOUTHERN PACIFIC COMPANY (SOUTHERN PACIFIC) STEAMSHIP LINES—"MORGAN LINE") COMMON CARRIER APPLICATION

Submitted June 15, 1942. Decided August 13, 1942

Applicant found entitled to continue operation as a common carrier by self-propelled vessels in the transportation of commodities generally, between New York, N. Y., and Galveston and Houston, Tex., and between Baltimore, Md., and Galveston and Houston, by reason of its having been engaged in such operation on January 1, 1940, and continuously since, except for interruptions of service beyond its control. Certificate issued.

J. R. Bell for applicant.

E. Myron Bull, Julian M. King, Parker McCollester, W. J. Mathey, M. G. de Quevedo, and E. B. Wright for protestants.

Stanley Carpenter for rail carriers in official territory.

Report of the Commission

Division 4, Commissioners PORTER, MAHAFFIE, and MILLER

By Division 4:

By application filed May 17, 1941, Southern Pacific Company, a corporation of the State of Kentucky owning and operating Southern Pacific Steamship Lines—"Morgan Line," seeks a certificate of public convenience and necessity under the provisions

of section 309 (a) of the Interstate Commerce Act, authorizing continuance of operations, in interstate or foreign commerce, as a common carrier by water of commodities generally, between New York, N. Y., and Galveston and Houston, Tex., and between Baltimore, Md., and Galveston and Houston. A hearing was held at which water carriers in coastwise and intercoastal services opposed the application. Rail carriers in official territory intervened as their interests might appear.

Under the above-mentioned provisions, applicant is entitled to a certificate of public convenience and necessity upon a showing that it was in bona fide operation as a common carrier of commodities generally between the ports indicated on January
458 1, 1940, and has so operated since that time except as to interruptions of service over which it had no control.

The Morgan Line was founded about 1835 by Captain Charles Morgan, and operated first sailing vessels and later steamships between United States north Atlantic ports and Gulf ports. While in control of this line, Captain Morgan constructed or acquired a line of railroad extending from opposite New Orleans, La., for a distance of about 80 miles to Morgan City, La. Early in 1883, the Southern Pacific Company, a railroad, purchased control of both the steamship and the railroad lines, under which ownership operation has since been continuous.

On application of the Southern Pacific Company under the provisions of section 5 of the Interstate Commerce Act, as amended by the Panama Canal Act, this Commission found in Southern Pac. Co. Ownership of Atlantic S. S. Lines, 43 I. C. C. 168 and 45 I. C. C. 505, that continuance of the ownership by the Southern Pacific Company of its Atlantic Steamship Lines, referred to as the Morgan Line, operating between New York and New Orleans and between New York and Galveston, was in the interest of the public and of advantage to the convenience and commerce of the people and would neither exclude, prevent, nor reduce competition on the routes by water under consideration. Our order of May 12, 1917, permitted continuance of the service between those ports. That order was modified January 9, 1923, authorizing the Southern Pacific Company to operate its Atlantic Steamship Lines in either regular or irregular service between New York and Sabine Pass, Texas City, Freeport, Houston, and Orange, Tex., and between Portland, Maine, Boston, Fall River, and New Bedford, Mass., Providence, R. I., Philadelphia, Pa., and Baltimore, on the one hand, and New Orleans, Galveston, and the other Gulf ports named, on the other, except from Philadelphia to Houston. Southern Pac. Co. Ownership of Atlantic S. S. Lines, 77 I. C. C. 124. Further modification of the order

of May 12, 1917, was ordered on February 12, 1935, authorizing service between Norfolk, Newport News, and Portsmouth, Va., on the one hand, and Galveston and Houston, on the other. Southern Pac. Co. Ownership of Atlantic S. S. Lines, 206 I. C. C. 427. All rates, fares, schedules, and regulations applying to the transportation of persons and property by the Atlantic Steamship Lines between the various ports named were required to be, and ever since have been, filed with the Commission and posted as required by the Interstate Commerce Act and our regulations.

The Morgan Line was admittedly in operation on January 1, 1940, over the routes and between the ports with respect to
459 which application is made and continued such operations until July 9, 1941, when its last vessel was delivered to the United States Maritime Commission. It is this cessation of operations upon which protestants base their opposition to granting the requested certificate. According to protestants, the only questions at issue are (1) whether the cessation of operations in 1941 was an "interruption" of service as the term is used in the act, and if so (2) whether it was an interruption "over which the applicant * * * had no control."

As of January 1, 1940, applicant's vessel equipment consisted of 13 steamships. The vessels in the Galveston-Houston runs also served Boston, New Bedford, and Norfolk, but the extension of direct service to the last 3 named ports was discontinued in December 1940. In January 1941, applicant announced the sale of its combination passenger and freight steamer Dixie to the United States Navy, and on February 14, 1941, gave notice of the discontinuance of steamship service between New Orleans and New York coincident with the delivery of the Dixie to the Navy on March 3, 1941. The 2 freight steamers which had been operated in the New Orleans-New York line were sold and delivered to another water carrier during March 1941. The remaining 10 vessels were operated in the services covered by the application.

By telegram of May 14, 1941, the Director of the Division of Emergency Shipping, United States Maritime Commission, requested officials of the Southern Pacific Company to meet him in Washington for a discussion with respect to tonnage for national defense requirements. There they were told that the Maritime Commission desired to charter two or three of the larger and faster ships of the Morgan Line for use on foreign routes. The matter was taken under advisement and on May 28, 1941, applicant wrote that Commission:

"We have given careful consideration to what our operating situation would be in event some of these ships were taken over by the Government, leaving us with only a part of our present fleet. We have not been able to work out a plan of operation in such

case which we consider satisfactory or readily workable. We, therefore, offer to sell all of the ten ships to the Government, at a price of $100, per dead weight ton on basis of 'as is', delivery to be made within a reasonable time, the ships now in service in the New York-Galveston run to be delivered at New York and the ships in the Baltimore-Galveston run to be delivered at Baltimore at the termination of Northbound trips in each case, with certain other customary provisions of sale, such as inclusion without additional charge of spare parts, broken stores, ship's furnishings, tools, navigating intruments, etc. * * * Will you kindly advise whether the above offer is acceptable."

No reply to this letter was ever received.

On June 4, 1941, at a meeting called by the Director of Emergency Shipping, operators of vessels in the coastwise trade
460 were called upon to furnish to the Government 50 percent of their vessels exceeding 3,500 dead-weight tons for use in transporting supplies and munitions in connection with the defense program. The operators met again on the following day for a discussion of that proposal, after which each was asked by Maritime Commission officials whether his company would comply with the request. Definite replies from all operators present were required to be given not later than June 9, 1941. As this meeting adjourned, applicant's representative was informed of the desire of the Director of Emergency Shipping to see him that afternoon. At this second meeting on June 5, applicant was told that the Maritime Commission intended to take all of the ships of the Morgan Line by requisition if necessary, or by agreement, and at the price for each ship as named. This would eliminate the earlier proposal that Southern Pacific Company should turn over half of its tonnage. Applicant expressed dissatisfaction with the prices offered, considering them inadequate for the vessels, all of which were regarded as superior ships. These prices had been determined in another department of the Martime Commission and would not be discussed by the Director of Emergency Shipping. Under date of June 6, 1941, the Chairman of the Maritime Commission wrote applicant's vice president:

"The President of the United States, pursuant to the provisions of law, has directed the United States Maritime Commission to direct you to deliver immediately for national defense purposes the vessels hereinafter named. In order to comply with this directive, the United States Maritime Commission desires to purchase said vessels from your company at the respective price set opposite the names of the vessels and under the terms and conditions herein set forth.

* * * * *

"Your prompt acceptance of this offer will be appreciated."

The total purchase price for the 10 vessels named in this letter was $60,000 in excess of that orally stated on June 5, and averaged $71.09 dead-weight ton. Further efforts to obtain higher prices proved unsuccessful, and on June 9, 1941, applicant accepted the offer of the Maritime Commission. Thereafter, under authority granted by this Commission on June 24, 1941, as amended, applicant issued special supplements to all tariffs in which it participated announcing suspension until further notice of its steamship service between New York and Galveston-Houston, and between Baltimore and Galveston-Houston. All 10 ships were delivered within the period June 26–July 9, 1941.

Applicant accordingly is of the opinion that it had no control over the interruption of its service on the routes covered by the application, resulting from the taking of its vessels by the Maritime Commission.

Protesting coastwise carriers submit that the application should be denied on two grounds: First, that the sale of applicant's vessels in June 1941 and the consequent cessation of operations
461 were not beyond the control of applicant's officials, and that, if they had used the reasonable diligence which should be expected of them as officials of a line committed to the service of the public, they could have retained some of their vessels for operation. Second, on the ground that with the sale of all its vessels, whether voluntary or compelled, the resulting discontinuance of applicant's service must be held to have been not an interruption within the meaning of the statute with a definite intention to resume operations when conditions permit, but rather an abandonment which put an end to any "grandfather" rights which may have theretofore existed.

Protestants argue that the correct inference to be drawn from the statement of the Director of Emergency Shipping that the Maritime Commission intended to take all of applicant's ships by requisition if necessary is that such statement was a reply to applicant's offer of May 28 and represented an acceptance of applicant's voluntary offer to sell its ships except for a counterproposal as to the price to be paid. Protestants offered no disproof to the evidence concerning the requisitioning of the ships of the Morgan Line but argue that it is altogether possible that what was said in this regard was that the time might come in the future when it would be necessary for the Maritime Commission to requisition all ships.

The Maritime Commission gave no explanation of its intention to take all of applicant's vessels while asking the other lines to give only 50 percent of their ships. Its direction of June 6, 1941, to applicant to deliver its vessels was in the same wording used in directives to protestant Bull Steamship Line concerning that

carrier's vessels, compliance with which has been regarded by Bull Steamship Line as causing interruption to service beyond its control.

Protestants refer to a number of decisions involving applications for certificates or permits under the "grandfather" clauses of part II of the act, where there have been stoppages of operations and where it has been necessary to determine whether the stoppages were interruptions beyond the applicants' control. In those proceedings holding that interruptions were beyond the applicants' control, protestants say, it has been found that the applicant really desired to continue in operation and made diligent efforts to do so, being prevented either by Government requirements or by reason or circumstances in the creation of which the applicant itself had no part, and that applicant either resumed operations after the interruption or had a definite intention of doing so when the cause of the interruption should be removed; that where a party voluntarily and deliberately disposed of its equipment, making itself unable to continue operation, it could not claim an interruption beyond its control within the
462 intent of the act, but rather an abandonment which extinguished "grandfather" clause rights; and that, where the immediate cause of interruption of operations was an act of a court or of law, nevertheless, if the applicant had a part in creating the facts which brought the court or legal action into play, the interruption was not beyond the applicant's control.

The controlling facts in none of the cited proceedings were similar to those in the proceeding now under consideration. However, in Bull S. S. Line Common Carrier Application, 250 I. C. C. 317, the facts as to interruption of service are closely analogous to those here presented. There we said:

"Since the hearing applicant has suspended all services covered by its application and authorized by this report. This interruption to service was caused by the fact that the United States Government has taken applicant's vessels for operations essential to the war. Applicant has submitted satisfactory evidence that the vessels were so taken by the government. Such interruption to service is beyond the control of the applicant within the meaning of the provisions of section 309 (a) of the act."

This record shows that the United States Maritime Commission regarded applicant's vessels as necessary in the prosecution of war efforts and that for undisclosed reasons it preferred to purchase these vessels, although securing those of other operators in the coastwise trade under different arrangements. The urgency of the requirement and the determination to obtain the vessels are clear from the announced intention to requisition them if an agreement could not be reached. It follows that applicant

had but one course to pursue and that the consequent cessation of operations was an interruption to service beyond the control of applicant within the meaning of the provisions of section 809 (a).

We find that applicant was on January 1, 1940, and continuously since has been, in bona fide operation as a common carrier by self-propelled vessels, in interstate or foreign commerce, of general commodities between New York and Galveston and Houston, and between Baltimore and Galveston and Houston, except for interruptions to service beyond the control of the applicant, and that applicant is entitled to a certificate authorizing continuance of such operation, subject, however, to general conditions which are necessary to carry out, with respect to the continuance of applicant's operations the requirements of part III of the act, and the orders, rules, and regulations of the Commission thereunder.

An appropriate certificate will be issued.

463 *Certificate of public convenience and necessity*

At a Session of the Interstate Commerce Commission, Division 4, held at its office in Washington, D. C., on the 13th day of August A. D. 1942

No. W-352

SOUTHERN PACIFIC COMPANY (SOUTHERN PACIFIC STEAMSHIP LINES—"MORGAN LINE") COMMON CARRIER APPLICATION

The Southern Pacific Company (Southern Pacific Steamship Lines—"Morgan Line") having filed an application under the provisions of section 309 (a) of the Interstate Commerce Act for a certificate to continue operations as a common carrier by water; a hearing having been held, and full investigation of the matters and things involved having been made, and said division, on the date hereof, having made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is hereby certified, That public convenience and necessity require the continuance of operation by applicant as a common carrier, by self-propelled vessels, in interstate or foreign commerce, in the transportation of commodities generally, between New York, N. Y., and Galveston and Houston, Tex., and between Baltimore, Md., and Galveston and Houston, Tex.

It is ordered, That said carrier be, and it is hereby, authorized to perform the service specified above, subject, however, to such terms, conditions, and limitations as are now, or may hereafter be, attached to the exercise of such authority.

It is further ordered, That the holding of this certificate by said carrier be, and it is hereby, conditioned upon the exercise of the authority specified above, and upon compliance by said carrier with the requirements of the Interstate Commerce Act, and the orders, rules, and regulations of the Commission thereunder.

And it is further ordered, That this certificate shall take effect and be in force from and after September 25, 1942.

By the Commission, division 4.

[SEAL] W. P. BARTEL, *Secretary.*

466 *Defendant's Exhibit No. 1*

Before the Interstate Commerce Commission

Docket No. W-543

In the Matter of SEATRAIN LINES, INC., COMMON CARRIER APPLICATION

Docket No. W-587

In the Matter of FOSS LAUNCH & TUG CO., WASHINGTON (FORM BWC 2, EXHIBIT A, APPLICATION TO CONTINUE CONTRACT CARRIER OPERATION)

HEARING ROOM "B,"
INTERSTATE COMMERCE COMMISSION BLDG.,
Washington, D. C., Friday, July 21, 1944.

The above-entitled matters came on for oral argument before the Commission at 10 o'clock a. m.

Present: Commissioners PATTERSON (Chairman), PORTER, LEE, MAHAFFIE, MILLER, SPLAWN, and ROGERS.

Appearances

Parker McCollister, 25 Broadway, New York, N. Y.; for Seatrain Lines, Inc.

Joseph F. Eshelman, 1740 Broad Street Station Building, Philadelphia, Pa.; appearing for the Pennsylvania Railroad Company, Atlantic Coast Line Railroad Company, the Boston & Maine Railroad. Trustees of Central of Georgia Railway Company, Great
467 Northern Railway Company, the Long Island Railroad Company, Louisville & Nashville Railroad Company; Maine Central Railroad Company, Norfolk & Western Railway Company, Northern Pacific Railway Company, Seaboard Airline Railway Company, Southern Railway Company, Southern Pacific Company, Texas & New Orleans Railroad Company, and Union Pacific Railroad Company.

S. J. Wettrick, Arctic Building, Seattle, Washington, for applicant Foss Launch & Tug Company, in Docket 587.

Fletcher Rockwood, 1410 Yeon Building, Portland, Oregon; appearing for Puget Sound Navigation Company.

468–469 PROCEEDINGS

Chairman PATTERSON. The commission will hear argument in Docket No. W–543, Seatrain Lines, Inc., Common Carrier Application, and in Docket No. W–587, Foss Launch & Tug Company application.

Commissioners Alldredge and Aitchison are not here this morning, having been unavoidably detained, but they will read the argument and participate in the case. Mr. Collins.

Mr. COLLINS. Thank you, sir. I appear on behalf of the Trustee in Bankruptcy, or rather in Section 77 (b) reorganization of the Hoboken Manufacturers Railroad Company, which company has the facilities for Seatrain Lines, Inc., that is No. 543, at the present time.

I desire to present a petition for leave to intervene, the first point being that we had no notice whatsoever of these proceedings in which we feel ourselves vitally interested until about four or five days ago, and the petition has been served by mail upon the interested parties here, the letters going out on the 19th, as of which date the petition was prepared.

May I present the petition and then the argument for the intervention?

Chairman PATTERSON. Your petition will be received. The Commission will hear you with respect to whether or not
470 it should be granted. How much time will you need?

Mr. COLLINS. For that purpose I do not believe I need more than ten or fifteen minutes.

Chairman PATTERSON. All right; you may have fifteen minutes for that purpose.

Mr. COLLINS. I only had three copies of it available. I did not understand that the entire Commission would hear it.

Statement of Charles B. Collins on motion of Forest S. Smith, Trustee of Property of Hoboken Manufacturers' Railroad Company, for leave to intervene

Mr. COLLINS. If the Commission please, the petition recites the fact that Mr. Smith is the designated trustee under the District Court for the District of New Jersey of the property of the Hoboken Manufacturers' Railroad Company; that no plan of reorganization can be formulated unless it includes Seatrain Lines, Inc. We are at a point where the plan for reorganization

should be filed by the debtor by the 26th of this month. There is an application to extend that time.

We are interested, primarily, in retaining the Seatrain Lines, Inc., for which facilities have been prepared at the expense of the debtor, and Seatrain Lines has been there since 1932.

Seatrain Lines, according to the report already entered by the Commission, is the owner of all of the stock of the Hoboken
Manufacturers' Railroad Company; the two were operated
471 by an interlocking directorate. Seatrain Lines of course
at the present time is not operating because of the war and the fact that the Government has taken over its boats, but the facilities are still there. It has analyzed carefully the business of the applicant after reorganization and if satisfied, although at the present time Hoboken Manufacturers' Railroad Company is operated at a profit due to the war traffic, after the war it will be impossible to do so without Seatrain Lines continuing.

The order of the Commission which reopens these proceedings is dated January 27, 1944, and provides that the above-entitled proceedings be reopened for reconsideration, and then there is a short pertinent paragraph which states that the said proceeding be, and it is hereby reopened for hearing upon the question of whether or not the said findings and certificate and order of July 2, 1942, should be modified so as to authorize applicant to "continue to operate the service in which it was engaged, except for interruptions beyond its control, namely, as a common carrier by the 'seatrain' type of vessels in the transportation of liquid cargoes in bulk; of empty railroad cars, and of property loaded in freight cars received from and delivered to rail carriers and transported without transfer from the freight cars between the ports above mentioned.

The ports "above mentioned" were New York, New York, and
New Orleans, Louisiana, and Texas City, Texas. We con-
472 ceive that the order reopening is sufficiently broad to permit
of the question as to whether or not the ports should not have been originally limited to Hoboken, New Jersey, and Belle Chasse, Louisiana, and Texas City, Texas. That particular point is the one that we wish to raise, whether or not it has happened in the rate cases, there should not be the limitation from Hoboken, New Jersey, rather than New York, New York, to Louisiana. I believe that that sufficiently covers our point.

Chairman PATTERSON. Mr. McCollister.

Mr. MCCOLLISTER. I hope it is not on my time.

Chairman PATTERSON. No.

Mr. MCCOLLISTER. Because I knew nothing of this motion.

Chairman PATTERSON. No; you will have your hour. You can do a lot in an hour.

Mr. McCollister. I hope so. If the Commission please, I did not know of the motion of the Trustee of the Hoboken until this morning. I do not say that it did not reach my office in New York yesterday, but if it did, it did not come to my attention in the hour that I was there before I came down here, so that I knew nothing about it until at this time.

In view of Mr. Collins' statement of the purpose of the intervention I must urgently oppose the intervention on the ground that there is no such issue before the Commission in
473 this argument as to whether or not the certificate should be changed with regard to the description of the ports to and from which Seatrain Lines could operate. That is not a matter which has been raised in the proceedings which have heretofore been had, and I most respectfuly submit that it is not before your Honors, any suggestion to modify the certificate in that regard. It is, furthermore, an issue which can arise only after your Honors shall have decided the first and really the major issue which is before you here, namely, whether a certificate once issued confers rights which are not thereafter revocable.

I therefore submit that on the basis of Mr. Collins' statement of the purpose of the intervention, it is a purpose which has brought the issues before you now and therefore the petition for leave to intervene should not be allowed.

Chairman Patterson. Mr. Collins, if you desire to have a little time to argue the merits of your petition you may have it, and we will reserve the right to rule on the granting of the petition later on.

Mr. Collins. Thank you, sir. That will save the Trustee's right to present to the Commission its point.

Chairman Patterson. That is right.

Mr. Collins. Very well, sir. When would you have that argument?

Chairman Patterson. How much time do you want now
474 Mr. Collins. Probably 20 minutes, if I may.

Chairman Patterson. All right; you may have 20 minutes.

Mr. Collins. Shall I proceed now?

Chairman Patterson. You may proceed now.

Mr. McCollister. May I most respectfully take exception to the Commission's ruling that it will hear argument on the merits now? It takes us quite unprepared, we are not ready to go on with such an argument. I submit that counsel ought not to be heard in argument until he has been allowed to intervene and that the intervention ought not to be allowed because it is contrary to all of the Commission's rules, because it would broaden the issues before you now.

Chairman PATTERSON. The objection is sustained. We will not hear argument now. If the Commission, after consideration, grants your petition, briefs will be filed and briefs considered under our rules from there. You may proceed, Mr. McCollister.

Mr. MCCOLLISTER. May I have the usual time under the rules of ten days to reply to the petition for leave to intervene?

Chairman PATTERSON. Granted.

Argument of Parker McCollister, in behalf of Seatrain Lines, Inc.

Mr. MCCOLLISTER. May it please the Commission, I appear for Seatrain Lines, Inc., the applicant in Docket W-543. The proceeding is before you for argument today pursuant to the
475 reopening, or I might say attempted reopening of the proceeding by Division 4 on the two applications by Seatrain for the issuance to it pursuant to Section 309 of Part III of the Act of a certificate of convenience and necessity authorizing it to engage in transportation as a common carrier by water. The certificates prayed for, which were in effect combined into one certificate, but there were two applications, as I will explain presently, the one certificate responsive to the two applications was issued by the Commission through Division 4 by its order of July 2, 1942. There was no objection to the terms of the certificate when issued; there was no request for reconsideration or modification thereof and, accordingly, the certificate took effect in accordance with the terms of the order which provided that the certificate should be in force and effect from and after August 10, 1942.

That certificate certified that public convenience and necessity required the continuance of operations by Seatrain Lines as a common carrier by self-propelled vessels in interstate or foreign commerce in the transportation of commodities generally between the ports of New York, New York, New Orleans, Louisiana, and Texas City, Texas, via the Atlantic Ocean and the Gulf of Mexico.

Over a year later, by an order dated December 10, 1943, Division 4 reopened or said that it reopened the proceeding for reconsideration, and then by a further order——

476 Commr. LEE. Was that on the Division's own motion?

Mr. MCCOLLISTER. That was on the Division's own motion, so far as I can discover. The order, Mr. Commissioner Lee, says that "It is upon further consideration and good cause appearing." I can find in the docket no request for reopening by any party.

Then by a further order, dated January 27, 1944, the Commission, or Division 4 rather, in the same language, reopened the

proceeding for hearing upon the question, and this is the portion of the order read you by Mr. Collins:

"* * * Whether or not the said findings and certificate and order of July 2, 1942, should be modified so as to authorize applicant to continue to operate in service in which it was engaged, except for interruptions beyond its control, namely, as a common carrier by the 'seatrain' type of vessels in the transportation of liquid cargoes in bulk; of empty railroad cars, and of property loaded in freight cars received from and delivered to rail carriers and transported without transfer from the freight cars between *the ports above mentioned.*"

Now I might observe in passing, although I think the point does not merit extended discussion, but I might observe that the order that I have just read by its terms appears to be a prejudgment of the proceeding, because it leaves open the question whether the certificate should be modified so as to
477 authorize applicant to continue to operate in the service in which it was engaged—and then it goes on and describes, or purports to describe, that service, without there having been any rehearing or finding that that was the—that the service in which the applicant was engaged was limited as thus described.

Commr. MAHAFFIE. Was that description the description that was contained in the original report?

Mr. MCCOLLISTER. No; it was not.

Commr. LEE. Was there a hearing originally upon which a certificate was issued?

Mr. MCCOLLISTER. No; I will come to that, if I may, Mr. Commissioner. The proceedings up to that time, or I should say this, we filed a motion that the Division 4's order reopening the proceeding, the order of December and the order of January, should be vacated and set aside on the ground that the certificate having become effective by its terms without objection, and there being no showing and no allegation that there was any fraud or misrepresentation in connection with the application for the certificate, and it being shown, as we offered proof by affidavits that the certificate as issued had been relied upon and action had been taken by the applicant in reliance upon it, that for all those reasons the certificate was a franchise which was irrevo-
478 cable and should not be thereafter revoked or modified so as to withdraw the operating rights granted thereby, that the applicant was entitled to rely on the certificate according to its terms, and that therefore the proceeding was attempted to be reopened for a purpose which was beyond the jurisdiction of the Commission.

Commr. PORTER. Does not that indicate that it was inadvertent?

Mr. MCCOLLISTER. Well, I hope the Commission does not make or act carelessly when it has all the facts before it, as I will show you that it had here. Our motion——

Commr. PORTER. Well, your point briefly is that this Commission when it once issues a certificate that that ends it and that it loses its power to change, alter, or modify it in any respect whatsoever? Isn't that your motion?

Mr. MCCOLLISTER. Yes, Mr. Commissioner; if there is no fraud or misrepresentation and if there is full disclosure of the facts and if action has been taken by the applicant in reliance upon the rights granted.

In this instance there were, as I said, two applications; one an application by Seatrain Lines, Inc., under the grandfather clause for a certificate to continue in the operation in which it had long been engaged, the transportation as a common carrier by water between New Orleans and New York Harbor.

Another application was filed under the so-called interim clause seeking a certificate authorizing Seatrain Lines, Inc.,
479 to continue in the operation in which it had been engaged on February 1, 1941, but had not been engaged on January 1, 1940, namely, service between Texas City, Texas, and New York Harbor. That second application under the statute called for a finding of convenience and necessity. The grandfather clause application, of course, did not require such a finding but merely a finding that the service which authority was applied for was a service in which the applicant was engaged on the grandfather clause date, and since that date.

The Commission, or Division 4, handled the two applications together and, as I said, although we orally suggested that they involved different issues and should be separately handled, nevertheless issued the certificate prayed for in the form of a single order.

Chairman PATTERSON. All without any hearing?

Mr. MCCOLLISTER. There was no public hearing nor was there any request by any party for a public hearing. The Commission did send its inspectors to inspect Seatrain's records; these inspectors requested additional information, all of which was submitted, that is information beyond that which was submitted with the application, and that information was furnished. In the application I think there could be no question that we fully informed the Commission as to the nature of Seatrain's operations. These applications were made in 1941. Since 1932
480 the Commission had had before it various proceedings in which a vast amount of evidence had been taken regarding the Seatrain operation.

In the application and the data supporting the applications we made reference to all of these pending or decided cases and the evidence therein as proof of the nature and extent of the operations for which authority was requested. In those proceedings, as the Commission will recall, the operations of Seatrain Lines were described in great detail, the proceedings involving the Commission's own investigation of Seatrain. It included the beginning of Seatrain Lines' service in the fall of 1932, it involved the proceedings on the application of the Missouri Pacific and Texas Pacific Railroads for authority to continue to own stock in Seatrain—those applications being under the Panama Canal Act, and they included the proceeding on the complaint of the Hoboken Manufacturers' Railroad Company with regard to divisions, in which the terminal operations at New York Harbor incident to interchange of freight with Seatrain were thoroughly gone into.

Commr. PORTER. Well, now, as a part of this record, Mr. McCollister, I assume you are not claiming that the complete record in all of those cases you have just referred to are a part of this record, but simply the reports in those cases?

Mr. MCCOLLISTER. No, Mr. Commissioner; in our application we specifically asked the Commission in passing upon the application to take into consideration——

Commr. PORTER (interrupting). Well, but I refer to the
481 hearings that we have held under this reopening.

Mr. MCCOLLISTER. Oh, I am talking, your Honor, about the information and the representations that we made to the Commission.

Commr. PORTER. Oh, to secure in the first place your certificates?

Mr. MCCOLLISTER. That is right. And we therefore asked the Commission to take into consideration not only its reference to that case, but all of the evidence which was before it in those proceedings which were listed in the application.

Now we naturally in those proceedings stressed the non-break-bulk feature of Seatrain service, the movement of freight in railroad cars, and your Honors will find that in the first of those proceedings, the Seatrain investigation by the Commission on its own motion in which the development of Seatrain was described, and it was made very clear by the testimony of Mr. Brush that the first motive in the development of the Seatrain ships and other handling facilities was one of operating efficiency in the operation of a water carrier to eliminate stevedoring expense of handling the cargo at the ports and the delay to vessels incident to the ordinary break-bulk operation. That that was the motive which led to the research which in turn produced the Seatrain ships and the handling facilities. That likewise they provided benefits to shippers in the handling of their

482 freight at the port, but your Honors will recall that in the several rate cases before you you have found that those benefits from the standpoint of shippers were not such as to justify higher rates than the rates contemporaneously in effect via the break-bulk lines, and the evidence very definitely showed that Seatrain Lines was in competition with the break-bulk lines for the handling of the same type of freight.

The material to which we referred in our applications included the tariffs of Seatrain which defined its undertaking. Those tariffs are the same tariffs in many instances as are applicable via the freight break-bulk lines, they are tariffs which in no way limited the Seatrain's handling of the freight by railroad cars, the technical requirement was the same as other lines, and indeed all the railroads' evidence in all of the cases described Seatrain's off-track stations for the railroads less-than-carload freight. Those stations in Manhattan where freight is received and delivered to it, not in railroad cars obviously. All those circumstances were disclosed to the Commission in the applications for the certificates, and in the light of all that information Division 4 issued the certificate in the language which I read to you, which defines the authority of Seatrain Lines as authority to operate as a common carrier by self-propelled vessels in the transportation of commodities generally.

Under that authority any type of self-propelled vessel
483 can be used. We might have questioned in that your limitation to self-propelled vessels, and I have my own views on that, and I think my client might have followed along. For our purposes that was not necessary, but now when it is suggested that the certificate should be modified so as to prevent us from using any type of vessel other than those which we were operating before the ships were taken for war purposes, which would prevent us from handling freight other than freight interchanged in railroad cars, would prevent us from handling freight to and from our off-track freight stations, would prevent us from handling l. c. l. freight——

Commr. PORTER. Well, unless your l. c. l. freight is in boxcars.

Mr. MCCOLLISTER. Well, Mr. Commissioner, your order does not so state, your proposed——

Commr. PORTER. I know, the present one though.

Mr. MCCOLLISTER. The proposed order would limit us to freight interchanged with railroads——

Commr. PORTER. What proposed order is that?

Mr. MCCOLLISTER. As was cited in your order to show cause, as was cited in your order of January 27, 1944, whether the certificate should not be so modified as to authorize us to continue to engage, to operate in the transportation of liquid cargoes in bulk; of empty railroad cars, and property loaded in freight cars received

484 and delivered to rail carriers and transported without transfer from the freight cars between the ports above mentioned.

Your Honors will recall that in the Hoboken divisions case one of the bones of contention was the division of the Hoboken on freight which was transferred from cars, either because it was necessary for inspection, because the cars were out of order, because the freight was loaded by the railroad or tendered to Seatrain Lines by the railroads in cars exceeding Seatrain's size limitations.

My first question to which I wish to address my argument is whether the Commission may, under these circumstances, when full disclosure of the nature of Seatrain's operations has been made to you, whether you may amend the certificate and change the rights which have been issued and revoke our rights in very important particulars; that is, to use any other type of vessel or to handle freight in any other way when we have acted, as we have shown you, in reliance upon the certificate as issued.

Commr. MAHAFFIE. Mr. McCollister, before you take up that question, can you tell me this: You are familiar with the certificates that have been issued other carriers in the same trade, of course?

Mr. MCCOLLISTER. Yes; I am.

Commr. MAHAFFIE. Would those certificates permit those carriers to continue to handle traffic as it is handled by the

485 Seatrain Lines?

Mr. MCCOLLISTER. I think so; we think they should.

Commr. MAHAFFIE. In boxcars or car ferry?

Mr. MCCOLLISTER. That is right. They would. Those certificates, if your Honors please, are, generally speaking, in exactly the same language as ours. I have a whole lot of them here. Generally speaking they read "continue to engage in transportation as a common carrier by water"—here is the Clyde-Mallory, "continue to engage as a common carrier by self-propelled vessels in interstate and foreign commerce in the transportation of passengers and commodities generally." That is practically the same language as ours, except the carrying of passengers.

Commr. MAHAFFIE. If your patents have run out and it was desirable, or seemed to be desirable, that the Morgan Line engaged in that, there would be no limitation whatever on the right of Morgan Lines?

Mr. MCCOLLISTER. That is right; they think we ought to have that power, and that brings me to the second question, as to what limitation as a matter of policy, if you have the power to change the certificate you should put in them—but I would say this, that the certificates which have been issued, if there was no fraud or

misrepresentation or failure of full disclosure in the applications for the certificates, if they have become effective, you cannot
486 now revoke any of the rights, and they are entitled to all of the rights which would accrue under the language of the certificate.

Commr. PORTER. Forever and a day.

Mr. MCCOLLISTER. Forever and a day, so long as they do not abandon. If they abandon, that is another matter. It seems to be pretty well established by the decision of the courts that in the event of abandonment a certificate may be cancelled.

Now I say, if your Honors please, that that is so because of the very fundamental proposition under the Constitution that you may not take a person's property except for just compensation, and that certificates and the rights under certificates are property, and they are property because the certificates when acted upon constitute contracts between the grantee and the grantor, the Government being the grantor. They constitute contracts and contract rights or property rights which may not be taken away.

Your Honors please, if you followed the suggestions here indicated by Commissioner Porter's question, that a certificate may be modified from time to time after it has become effective so as to withdraw some of the rights granted thereby, it would be converting certificates into mere revocable licenses to operate rather what I am sure Congress intended that they should be, franchise rights. In my brief I review the authorities on the question
487 of the distinction between revocable licenses and franchise rights, and I think that the cases which I have cited to you, and I think they are the principal cases on the subject, and I can find none to the contrary, these cases which I have cited to you at pages 20 to 30 of my brief clearly support the proposition both that rights such as those created by a certificate are franchise rights rather than revocable licensing permits, and that being franchise rights, they may not be revoked.

For example, and do not want to burden your Honors here with reading too much, but I would read to you a couple of sentences from the decision of the New York courts in Trustees of Southampton, 162 New York, which has been generally cited in all of the cases and is cited by the Supreme Court in the Owensboro case, 230 U. S. There the New York Court, in language which is quoted in the Owensboro case, said:

"A license is a personal, revocable, and nonassignable privilege, given by writing or parole to one, without interest in the lands of another, to do one or more acts of a temporary nature upon such lands."

The Court went on to say:

"A franchise is a grant by and under the authority of government, conferring a special and usually a permanent right to do an act, or a series of acts, of public concern, and, when accepted, it becomes a contract and is irrevocable, unless the right to revoke is expressly reserved."

In Frost v. Corporation Commission, a quite recent case,
488 in 278 U. S., the Court was called upon to determine whether the grant of authority to operate a cotton gin was a revocable license which could be revoked and modified, or whether it was a franchise which could not be disturbed, and the Court said that the right to operate a gin and to collect tolls therefor is not a mere license but a franchise that, skipping a few words, "and as such it constitutes a property right within the protection of the Fourteenth Amendment."

In the Owensboro case, which a very important case on this general subject, 230 U. S. 58, the Supreme Court again discussed the difference between a license, which it said is revocable, and a franchise. That was what was claimed to be a franchise, and a Court found that it was, to operate a telephone company. And the Court said:

"That the grant in the present case was not a mere license is evident from the fact that it was upon its face neither personal nor for a temporary purpose."

And then the Court went on to say:

"If there be authority to make the grant and it contains no limitation or qualification as to duration, the plainest principles of justice and right demand that it shall not be cut down, in the absence of some controlling principle of public policy."

And then the Court proceeded to discuss the reasons why that was so, and in language which I think should carry great
489 weight with your Honors in dealing with certificates granted to common carriers. The Court said:

"This conclusion finds support from a consideration of the public and permanent character of the business such companies conduct and the large investment which is justly contemplated. If the grant be accepted and the contemplated expenditure made, the right cannot be destroyed by legislative enactment or city ordinance based upon legislative power, without violating the prohibitions placed in the Constitution for the protection of property rights."

Your Honors have yourselves in a number of cases followed these principles in cases involving motor carriers. In the Quaker City Bus case, 38 M. C. C., you said:

"The existence of a certificate creates a vested motor-carrier

status which stays in force and effect for the life of the certificate."

Then you have before you the guide-post case of Smith Brothers in 33 M. C. C., and there you said that the language of Part II of the Act shows clearly, definitely, and unmistakably that "Congress intended that a certificate, once effective, may be terminated by us only on the conditions, and according to the procedure, therein specifically provided."

Commr. PORTER. Well, but that assumes, the statute assum's, the right to do that and the conditions made in that particular section, does it not?

490 Mr. MCCOLLISTER. That is right, Mr. Commissioner, and that emphasises our position here because Part II of the Act does provide a machinery for the revocation of certificates, under certain circumstances and only under certain circumstances. That means that any certificate issued under Part II embodies as a part of its terms that particular condition, that if those circumstances specified in the section shall occur and if the procedure therein definitely specified, and it is a very precise procedure, that procedure is followed that you may under those circumstances, revoke the right. But it is significant that in Part III Congress indicated that you should not under any circumstances revoke the rights of water carriers, because there is no provision any more than there is in Part I of the Act that a certificate once granted and acted upon may be under any circumstances and by any form of procedure revoked.

Commr. LEE. Well, you haven't got the first sentence of that section 212 in the Water Carrier Act, have we?

Mr. MCCOLLISTER. You have not.

Commr. LEE. That the license shall be "effective from the date specified therein, and shall remain in effect until suspended or terminated as herein provided."

Mr. MCCOLLISTER. That is right; it is not there. Now this certificate issued to Seatrain Lines, like the certificate issued to the other steamship lines in the coastwise trade, did not in the certificate itself specify any period of duration of the rights

491 thereby granted. It did not contain authority to revoke it or the indication of the conditions under which if that should occur the rights granted might be revoked. There is no provision, as I have just said, in Part III similar to that of Part II, a similar section to 212, Part II, providing for revocation under certain circumstances.

Commr. PORTER. Do you overlook paragraph (c) of Section 315?

Mr. MCCOLLISTER. I am coming to that right now, Mr. Commissioner. If the suggestion be that that provision, Section 315,

paragraph (d) which provides that "all orders of the Commission, other than orders for the payment of money, shall take effect within such reasonable, not less than 30 days, as the Commission may prescribe, and shall continue in force until its further order, or for a specified period of time, according as shall be prescribed in the order * * *."

If it is suggested that that provision empowers the Commission to revoke a certificate, my answer is that that provision is talking about regulatory orders rather than certificates.

Now it is perhaps significant that section 309 and the other provisions relating to certificates never use the word "order," they talk about certificates. Your Honors have adopted the form
492 of issuing certificates by orders. But the mere fact that you may call what you issue an order does not, I submit, bring it within the temporary effect, the effect of which would make it temporary because of the provisions of section 315 (d) relating to orders. As a matter of fact, in the Smith Brothers case your Honors very specifically held that the provisions of Part II relating to orders and providing that orders might be modified did not empower you to modify your certificates. And that was a correct decision, in the light of the cases dealing with franchises.

Commr. PORTER. Well, wasn't it also a correct decision because the matter was definitely and specifically covered by another section, which is not true of Part III?

Mr. MCCOLLISTER. Yes, Mr. Commissioner; and the fact that it is not covered by another section means that Congress did not intend that they should be revoked under any circumstances, I submit.

Commr. PORTER. In other words, you overlook (b) and (c) entirely then, don't you, of Section 315?

Mr. MCCOLLISTER. I do not think so.

Commr. PORTER. Well, that the Commission may upon such notice and in such manner as it shall deem proper and within the limitation of time that we do have to do it, after hearing, which has been attempted in this case.

Mr. MCCOLLISTER. Well, I say, your Honor, that that has no application to certificates in that certificates are not
493 necessarily orders. I say that what is meant there by orders, are orders of a regulatory nature, and on that point I cite you as I think controlling authority the decision of the Supreme Court in the Owensboro case to which I have referred and in which the contention there made was that the municipality which had granted the franchise to the telephone company had general power to repeal or modify its ordinances and it was said that that gave it the power to modify and repeal an ordinance

granting a franchise to the telephone company to lay its lines in the city streets. The Court said:

"This general power to repeal ordinances"—which would be like the provision of section 315—"obviously refers to ordinances which are legislative in character, and exertions of the Government power of the municipal council, * * *. The power to repeal, alter and amend such ordinances is one which inheres in the power to legislate, and its mention is pure surplusage.

"To construe this general power of repeal as a reservation of a power to revoke or destroy contractual rights which have vested under an ordinance which, upon its face, makes no such reservation, would be to place every contract made by the city by virtue of an ordinance, legislative in form, subject to the
mercy of changeable city councils. In the absence of an
494 express reservation in the contractual ordinance, or an
express delegation of power to revoke contracts under such ordinances, we think no such extraordinary power is to be implied."

And I submit, your Honors, that no such extraordinary power to nullify certificates upon which water carriers must rely in buying and building ships and acquiring terminal facilities and doing all that is necessary to run and operate a steamship line, that power to make such power temporary is not to be implied from the language of section 315. Your Honors must construe the statute in accordance with the declared policies of the Congress. Among those policies is that there shall be a strong merchant marine in the domestic trade under private ownership, and I ask you whether any of you would invest your money in a water carrier for the purpose of requiring ships worth several millions of dollars if after that investment had been made in reliance upon a certificate granting operating rights, those operating rights could be revoked by you because you changed your mind about what the general economic policy or transportation policy of the country should be. I submit that there would not be a cent of money invested in the domestic merchant marine if certificates were orders revocable or subject to modification by you as you may modify your orders prescribing rates for doing any of the regulatory acts which the statute contemplates that you shall do.

Commr. PORTER. Am I to take it, Mr. McCollister, from
495 your argument, that if the Commission in its order or
certificate, whichever you want to call it, should give you say the right, as it has done in some cases, to transport a limited number of commodities, that we could not change that and give you general commodities, or that if we had given you general commodities that we could not afterwards restrict that in any way as to the subject of carriage?

Mr. McCollister. Well, Mr. Commissioner, there are two general exceptions to the proposition that these franchise rights are not subject to revocation. One is the one I indicated that of course if the governmental body has been deceived and has given rights under misrepresentation, and that develops, there is inherent power in government to correct the situation. It also seems to be recognized by the cases that if rights have been abandoned the grantor governmental body may revoke the franchise so that there shall not be outstanding the clutter up the record and cause confusion franchises which have not been acted upon.

Your Honors have before you, or have had before you, the Levisa case involving somewhat similar questions so far as certificates are concerned. I refer to that somewhat briefly in the brief that I filed with you, and I will say only this, that I think the Levisa case, where you have apparently held that under the facts of that case the certificate granted could be re-
496 voked—granted to a railroad—could be revoked. There appeared to have been present, according to your report, both the element of misrepresentation by the applicant and failure of the applicant to accept the franchise by undertaking and carrying on construction and operation thereunder. If those facts were present, and I do not say they were, except that they are indicated by your report and it appears to me from your report that just on those grounds on which you base your decision that the situation is clearly distinguishable from that here, because I would concede that if those facts were present you did have the power as an inherent power of government to correct the situation; but here there was no misrepresentation in connection with these applications as to the nature of the Seatrains' operations or undertakings.

Commr. Rogers. Have you thought about section 309 (d) where it gives the Commission the power to attack certain restrictions or "terms, conditions, and limitations as the public convenience and necessity may from time to time require * * *"?

Mr. McCollister. Yes, Mr. Commissioner; I have thought about that and in my brief I have discussed it, and made this point, that that too must be subject to the fundamental proposition that a franchise is a contract. Now if you had, in the certificate which you granted in these coastwise lines cases stated to the coastwise lines, "This certificate will continue in effect only so long
497 as we want it to continue in effect," or "for a period of a year," and so forth, that would be one thing, but your Honors in the Smith Brothers case said that a clause similar to that in Part II had nothing to do with the revocation of rights,

that there is not the revocation of rights, but has to do with establishment of terms and conditions relating to the exercise of the rights granted. Now, my point is that you may not revoke the rights, and that is what would be accomplished by what is proposed.

Commr. PORTER. We are not seeking to revoke your right to operate your ships in the maritime trade, but we are only seeking a modification or a limitation as "o the method; that is all, isn't it? We are not revoking your right?

Mr. MCCOLLISTER. Oh, yes, Mr. Commissioner, and that brings me to my next point.

Commr. PORTER. Well, I am sorry I anticipate your point.

Mr. MCCOLLISTER. You do, and all the times we have been over this we must understand each other.

Commr. ROGERS. If the word "limitation" does not mean that we may limit or restrict the terms of the certificate granted from time to time as the public convenience and necessity may require, I do not see that "limitation" would mean anything.

Mr. MCCOLLISTER. Well, if your Honor will go back you will note there just before what you read it says: "Such certificate shall specify the route or routes * * * and there shall be attached to the exercise of the privileges granted by such
498 certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require * * * for instance, your safety regulations, and file tests, and file our rates with the Commission, such as may be required, matters that have to do with the exercise of the privilege, but——

Commr. ROGERS. Those things would not have anything to do with public convenience and necessity, would they? This says we can from time to time as public convenience and necessity may require.

Mr. MCCOLLISTER. Oh, I think it would have to do that, I trust that your Honors conduct the regulation of carriers from the standpoint of public convenience and necessity.

Commr. PORTER. Well, did not Congress really construe that section against that contention when it said "provided, however," dealing with this very question of limitations, "that no terms, conditions, or limitations shall restrict the right of the carrier to add to its equipment, facilities, or service within the scope of such certificate?"

Does not Congress there in effect construe the previous part of that section along the line suggested by Commisisoner Rogers?

Mr. MCCOLLISTER. Well, I do not see it that way, Mr. Commissioner.

Commr. PORTER. In other words, why put in that restriction on our power unless we had the power granted to limit in
499 the prior part of the sentence?

Mr. MCCOLLISTER. Because you might have said this, you gave us the power to engage in transportation as a common carrier by self-propelled vessel. That means any kind of self-propelled vessel as I see it. You might have come along later with a term or condition of this section, and say, "Well, you shall only have five self-propelled vessels." And the statute says that you cannot do that, you may not limit us in adding to our equipment within the scope of the certificate, Mr. Commissioner. You have to go back to the scope of the certificate, you can't change the scope of the certificate. The scope of the certificate is to engage in transportation of commodities generally by the use of self-propelled vessels, and you can't limit that, cannot limit our rights in that regard to a certain number of self-propelled vessels, nor can you, I submit, to a particular kind of self-propelled vessels.

Commr. MAHAFFIE. Would the converse be true, that we might require you greatly to extend the services and facilities?

Mr. MCCOLLISTER. I do not think you could do that either.

Commr. MAHAFFIE. What would be the limitation on that if we found that public convenience and necessity required it?

Mr. MCCOLLISTER. As I say, the statute, your Honor, so
500 far as water carriers are concerned, what the Congress intended to achieve was that there should be no carrier engaged in coastwise or intercoastal transportation other than those in operation on January 1, 1940, except as new carriers should prove to your satisfaction that the public convenience and necessity required the addition of their services. But I do not think that the Act was intended ever to mean to empower this Commission to decide how many vessels, whether more or less, or what type of vessels those carriers that were guaranteed the right to continue to operate should have.

That brings me now to my next point, which I will deal with only very briefly, because it does not arise if your Honors conclude, as I submit that you should, that since you have acted upon the certificate, granted according to its terms, the certificate must stand according to its terms and cannot be modified in such manner as to limit any of the rights that we would have under the language of that certificate, including the right to use other ships or vessels, other types of new equipment, if they are developed.

Commr. PORTER. Well now, I suppose you are going to tell us what you have done in accepting.

Mr. MCCOLLISTER. That is in an affidavit that we filed, Mr. Commissioner. We mentioned the improvements. The ships have been requisitioned, as your Honors know. They were requisi-

tioned for title, as the term goes, in the shipping trade, by the Government. Despite that fact Seatrain Lines has
501 maintained its organization to be prepared to continue its operation, it has maintained its tariffs on file with you, and more than that, in reliance on the certificate, it has contracted with the Government to reacquire the titles to the ships that were requisitioned.

Commr. PORTER. Since the issuance of the certificate?

Mr. MCCOLLISTER. Beg pardon?

Commr. PORTER. Since the issuance of the certificate?

Mr. MCCOLLISTER. Since the issuance of the certificate.

Commr. PORTER. I want to ask you another question, if you do not mind.

Mr. MCCOLLISTER. I would be glad to answer it.

Commr. PORTER. Going back a little further: As I understand, you claim that in these former proceedings before the Commission —Seatrain Lines proceedings—that it has been discussed there that, or disclosed, that Seatrain was handling bulk commodities as well as commodities in railroad cars. My question is whether or not such information is available to the Commission since it was introduced in these other cases, available to it.

Mr. MCCOLLISTER. Well, I would say this, Mr. Commissioner, that the proceedings on these applications were necessarily, as you said at the beginning, they should be informal in character. And when there was no contest, as there has been
502 none in our case, none of our competitors, rail or otherwise, objected to our application in the terms in which we filed it, so that the proceedings were somewhat informal. It might be that for the purposes of litigated proceedings a mere reference to testimony in these cases would not incorporate that in the record without a more precise stipulation, but the fact is that in our applications we did make reference, I tried to quote the exact language then, and we did make reference to the pending cases and to all of the evidence here; this is in connection with the New Orleans application; reference is made to the files of the Interstate Commerce Commission in the following proceedings, among others, and to the evidence before the Commission in those proceedings, and there listed 1, 2, 3, 4, 5, 6, 7, proceedings.

Commr. PORTER. Well, there was nothing in those findings of record to indicate that you were carrying or transporting loaded cars, was there?

Mr. MCCOLLISTER. Oh, yes, Mr. Commissioner; there was in the Texas case; there was a description of our operations in the handling of large machinery which could not be loaded in cars. And more than that, there was in all of the cases a detailed description of our port-to-port operation, and we very definitely made the

point that the railroad practice of which we there complained resulted in an uneconomical situation in that because the railroad discouraged the movement of other freight on Seatrain
503 Lines, Seatrain was compelled to carry port-to-port freight.

Now most of that was carried on road cars, but it was not received from or delivered to Seatrain Lines in railroad cars, and if Seatrain Lines saw fit to put it in railroad cars for its own purposes of storage, that was no more nor less, as I see it, than putting it in a container or putting it in a compartment in the hull of a ship.

My time is running out, and I have got to touch on the other question very briefly.

Commr. MAHAFFIE. Before you do that——

Mr. MCCOLLISTER. Yes.

Commr. MAHAFFIE (continuing). I take it that your contention is that, from this testimony that you have referred to, and the facts in other cases, that you could meet those requirements in this show cause order except as to the matter of interchange.

Mr. MCCOLLISTER. That is not our point. Our point is that we ought not to be required, we have a right not to be required, to meet the test of that order.

Commr. MAHAFFIE. I know you are making that point.

Mr. MCCOLLISTER. Yes.

Commr. MAHAFFIE. But you are also talking about the testimony. Now from your discussion of that I take it that you could meet it except as to the interchange?

Mr. MCCOLLISTER. No; I do not know as I understand exactly what you mean, Mr. Commissioner, by "meeting" it; but we could not handle a good deal of freight that we did handle, under
504 this order.

Commr. MAHAFFIE. Well, if I understand you correctly, you would be excluded to the extent that the freight is not received from other railroads?

Mr. MCCOLLISTER. Yes, but we would be——

Commr. MAHAFFIE. But otherwise you would meet it, wouldn't you, if I have followed you correctly?

Mr. MCCOLLISTER. Well, under the terms of the show-cause order we could not if we had freight tendered to us loose, as all of our freight at our downtown station in New York is tendered to us, we could not carry that freight unless we put it in a railroad car. Now there are times when it is not desirable to put it in a railroad car, and yet there are times when the freight comes there billed via Seatrain under rates that Seatrain undertakes, and Seatrain is not limited to the handling of freight in railroad cars, a shipper will take his freight and carry it there when he knows it is under our tariff undertaking.

Chairman PATTERSON. As a matter of fact, do you or do you not during the critical period handle this freight in railroad cars always, or is it sometimes handled otherwise?

Mr. MCCOLLISTER. I understand it was sometimes handled otherwise, Mr. Commissioner. I would not misrepresent the facts to the Commission, although we have avoided intentionally representing the case here on a factual basis because we do want
505 to raise only the question of law as to your power and therefore we have not presented proof, which we had an opportunity to do, I would say, but we actually carry, and how we actually carry it. I would not want to mislead you and suggest that we carry any substantial portion of our business other than in railroad cars, but there was some, and you can call it "considerable," depending upon what the word "considerable" means, and looking toward the future, the limitation of having to have to handle freight in railroad cars is a very serious limitation.

Chairman PATTERSON. There would be some commodities that would normally take two railroad cars, and you would not be able to handle that except with a sling, the railroad cars or containers, and that you would not be able to take, as you contend, that freight under those circumstances?

Mr. MCCOLLISTER. Mr. Commissioner, that goes to my next point, which is that we very definitely and as vigorously as we can, want to urge upon the Commission that it is not for the Commission to decide, that the Act does not give the power to decide how a water carrier from the standpoint of its own operating economy and efficiency shall handle cargo. When we handle freight, any railroad freight, we generally handle it in railroad cars. That is a matter of operating efficiency
506 from the standpoint of Seatrain Lines. Generally it is better to handle it in railroad cars, but not always, and we insist that we have the right to operate as a water carrier in the way that is best for us to operate as a water carrier or in the judgment of the management of the company, and we submit that the statute does not empower this Commission to say that the cars the Morgan Lines used, side-port ships it must continue to use ships that are loaded through side ports in the future, that it does not empower the Commission to say that because when Clyde-Mallory employed old-type cargo vessels that loaded the cargo by tackle through a deck hatch, that it must continue to handle cargo in that way, and may not take any cargo in railroad cars or containers. We say that for the Commission to set itself up as an arbiter of the way the water carriers shall operate would kill the merchant marine of the country and that it is beyond your Honors' power.

Now your Honors, if I may incorporate one more example of that, it is suggested that you have the power to do that under your right to classify accorded by the statute. I submit that that power to classify means classify for regulatory purposes rather than as to the way in which the carriers shall perform their operations.

Commr. SPLAWN. On that point, you had a case before us some time ago involving the per diem that you paid for the cars belonging to the railroads, did you not?

507 Mr. MCCOLLISTER. That is right.

Commr. SPLAWN. In that case there was no question about your being a common carrier and able to publish joint water-rail rates if you could get the concurrence of the railroads; was there?

Mr. MCCOLLISTER. There was no question about it, Mr. Commissioner.

Commr. SPLAWN. And some of the questions in that case amounted, I think, to asking you if you were not an ocean-going ferry, and one question that we were to pass upon, as I recall, in that connection, was how much you should pay for the equipment of the railroads that you had had on the boats. Is that correct?

Mr. MCCOLLISTER. Well, I think, Mr. Splawn, you are confusing two cases. The original Seatrain Lines investigation was the one in which the question was whether Seatrain was a car ferry and therefore a railroad under the definition of the statute, or Part I, or whether it was a water carrier, and in that case, with Mr. Commissioner Mahaffie dissenting, you concluded that Seatrain Lines was a water carrier. Then there was a later case, which we call the Car Service case, which involved the obligation of the railroads to permit their cars to be interchanged with Seatrain in the performance of their transportation, and what per diem or compensation they were entitled to receive when their cases were so used.

508 Commr. SPLAWN. Now, in the determination that you were a water carrier, did not we find that you were the ferry type of water carrier, limited to transporting some distance on the ocean?

Mr. MCCOLLISTER. Well, you described, naturally described the principal characteristics of Seatrain service; that is correct; but your findings, there is nothing in your findings in that decision, because the issue was not there, as to whether that was the only way in which we carried cargo, in railroad cars.

Commr. SPLAWN. The point, as I understand, that is urged here is that you are not only a water carrier, common carrier, but that you carry lading in bulk as well as in the hull, as well as in cars within the discretion of the management in operating detail, and that since we have given you a certificate within which

you may exercise that discretion, we may not now say that we made a mistake and we should hold you down to merely operating railroad cars interchanged between you and the railroads.

Mr. McCollister. Well, that is almost our position, Commissioner Splawn, but not quite. If I may distinguish it a little bit.

Commr. Splawn. Yes; I want you to. Go ahead.

Mr. McCollister. Our position is this, that in connection with our application we made full disclosure to the Commission
509 as to the nature of the operation, and as to the nature of Seatrain Lines undertaking, that it had no limitation in its undertaking or its obligation to shippers to carry freight in railroad cars, that it did carry freight that was not in railroad cars or was transferred at the ports, and that under all of those circumstances the Commission when it issued the certificate in the language which it employed, which would not limit us to carrying freight in railroad cars, that there was no misrepresentation or fraud so far as we are concerned, and that has not been alleged here, that therefore we were entitled to rely on the assumption that the Commission issued the certificate with full knowledge, that we have acted in reliance on that certificate, and are entitled to all of the rights thereafter and to continue to exercise all of the rights that that certificate by its language grants to us. That is our first point.

Our second point is that what is suggested by the Commission's order here, or the suggested order of Division 4 under consideration here, is that the Commission not because of any change in fact, not because of any misrepresentation, but because Division 4 has changed its policy with respect to certificates and now proposes to limit water carriers to the use of particular types of vessels and to the handling of freight in a particular manner, that now because of that our certificates may be modified in accordance with this new policy.

510 Now we say you haven't the power to modify the certificate at all, you do not come to that next point, but if the Commission finds that you have the power to revoke operating rights for some purpose, you could not do it for the purpose of specifying the type of ship or the method of handling, because that is not a function of this Commission in the regulation of water carriers, and if this Commission undertook to exercise such a function it would be infringing on the function of the Maritime Commission, on the functions of management of the steamship lines, and would defeat the whole purpose of the maintenance of a strong Merchant Marine under the Act.

Commr. Porter. Maybe the majority of us were wrong originally and we ought to go back and hold that you were a car ferry, with the minority of the Commission.

Mr. McCollister. Well, maybe you were, but I do not think you were, and we are entitled to go sailing ahead. I thank you very much.

Chairman Patterson. Mr. Eshelman.

Commr. Mahaffie. We would have saved you a lot of trouble Mr. Eshelman.

Mr. McCollister. Well, it might, but I think Mr. Eshelman might have stirred up something else under his general point of view.

Commr. Mahaffie. He made you one of the club.

511 *Argument of Joseph F. Eshelman, in behalf of the rail lines*

Mr. Eshelman. May it please the Commission: I appear for the fifteen railroads who are the cross-appellants in the so-called Seatrain Car case now pending in the Supreme Court on appeal.

That case, as the Commission knows, involves questions concerning the nature and extent of the obligations, if any, of the railroads to furnish cars for the use of common carriers by water with which through routes are in effect or are prescribed.

As we understand the position taken by the applicant in this proceeding, it is entitled under its present certificate to use virtually any type of ship or other equipment or carriage that it may see fit.

If this position be a sound one, it is our understanding that counsel for applicant seems to have so admitted, that it would follow as a necessary corrolary that the break-bulk lines under their present certificates, and without seeking any modification in them or presenting any new proof of public convenience and necessity or otherwise, would be entitled forever to engage in operations with the seatrain type of vessel, particularly since the patents have expired.

The Commission's order in the Seatrain Car case was predicated upon the existence of through routes with Seatrain. Through routes are already in existence between
512 the railroads and the break-bulk water carriers, as the Commission knows.

Therefore, if Seatrain's contention is here upheld, it would seem that the break-bulk lines would be free to engage in the Seatrain type of operation and thereby to cast upon the railroads substantial burdens in the way of furnishing them with the necessary cars with which to carry on their business.

Commr. Miller. It would not necessarily be a seatrain type of ship, would it; they use other types of ships on which to run cars!

Mr. Eshelman. Yes; I think that is right, but Seatrain has

been peculiarly effective in its operating sense, and I think they might possibly make some modification or at least would be free to engage with the Seatrain type of ship.

For these reasons, while I do not propose to discuss the question of power, but assuming that it does exist, to make a modification of the certificate, I would like to discuss primarily on behalf of these railroads the point that Seatrain service is so unique and so different from that of other water carriers as not to warrant a certificate of the scope previously issued.

On the contrary, its type of operation is so distinctive as to dictate that its certificate should not go beyond the proper pounds of enabling it to continue its former operation.

The decisions of the Commission are repleted with find-
513 ings which establish the distinctive character of Seatrain's operations.

In its initial report in Investigation of Seatrain Lines, Inc., 195, I: C. C. 215, the Commission describes the seatrain vessels in part as follows:

"While the original vessel has tank space for 2,200 tons of liquid cargo, and the new vessels have tank space for 4,000 tons of liquid cargo, each vessel is designed primarily for transportation of cargo only when loaded in railroad cars. Each vessel has four decks, and each deck has four sets of railroad tracks of standard gauge, the aggregate length of tracks on each vessel being approximately one mile. The original vessel has a capacity of 95 cars, and each of the new vessels has a capacity of 100 cars. These vessels can handle cargo in railroad cars only between ports at which specific loading facilities have been provided. Such facilities have been provided at only three ports, namely, Hoboken, New Orleans, and Havana."

The unusual type of the loading facilities employed were described in the same report, at page 219, as follows:

"The loading facilities consist of a combination elevator and crane, the elevator shaft being erected on the dock, and the stationary farms of the crane extending from the frame of
514 the elevator shaft out over the slip. The floor of the elevator is a movable platform, called a cradle, on which is laid a single track of standard gauge. The cradle, when in place on the dock, forms a section of the railroad track over which cars are moved to and from the cradle."

The novel method of loading and unloading seatrain vessels is described at pages 219-220 of the report. The report says:

"In loading a seatrain vessel a car is moved by locomotive over the railroad tracks of the Hoboken or the New Orleans & Lower Coast, as the case may be, and stopped on the section of track laid on the cradle where it is blocked and secured. The four corners

of the cradle are connected to bails which in turn are attached to an overhead crane. The crane through the bails and cradle lifts the car vertically until the car and cradle are higher than the bulwark of the vessel. Car and cradle are then moved along the arms of the crane to a position over one of the four hatchways of the vessel and lowered through the hatchway, which forms another elevator shaft, to one of the four decks on which the car is to be stored. The cradle for the time being becomes a part of that particular deck, the tracks on the cradle articulating with the tracks on the deck to form a continuous track over which the car is moved from the cradle by a car puller to the desired
515 position on the deck track, where it is secured and made fast to take care of motion of the ship while at sea. When a deck has been loaded the cradle is left in place and serves as a hatch cover for that deck. Unloading is the reverse of the process of loading. Often cars may be loaded and unloaded at the same time. That is, the cradle instead of being hoisted out empty is loaded with a car lifted out of the ship, moved along the crane arms to the elevator shaft over the dock, and lowered to position in the railroad track over which the car is moved from the cradle by a locomotive."

I see that I cannot give these various quotations in the time allotted to me, but I would call your attention to this, at page 221, where the Commission concluded—"It is evident that the Seatrain vessels are not car floats."

Also, at page 221, it compared the service performed by seatrain vessels with that performed by the Florida East Coast carry ferry and went into some description of that that I think is pertinent on the question as to whether this is a distinctive type of service.

There were also, at pages 221 and 222, findings as to the difference between seatrain ships and car ferries which was as I recall specifically based largely on the testimony of the president of the company.

In concluding its comparison of the seatrain operation with that of car ferries, the Commission said:

516 "The vessel used by Seatrain is far larger and of a different type than the vessel envisaged when the word 'ferry' or 'car ferry' is mentioned. Its method of operation is not the method used in operating any other ferry here or elsewhere in the world. The nature of service rendered, while similar, is not the same as that rendered by ferries. The word 'ferry' was used in the Act entitled 'An Act to Regulate Commerce' approved February 4, 1887; Congress reexamined its use of the word in the Transportation Act, 1920, Sec. 400. We assume that Congress in including and maintaining ferries in the term railroad had

in mind the type of vessel then currently common known as a ferry, and not a vessel which, as we have seen, is of a type then unknown and which is still unique in function."

The Commission then went on to differentiate between the arrangements for interchange of traffic with railroads by seatrain and by other water lines, and spoke of this arrangement as being so different from the customary arrangement, and in particular it referred to the similar connection between ordinary rail and water carriers, while there were extra services required, special facilities needed, and special arrangements between Seatrain and its connections. I refer to the findings at page 229 of your original report.

Going on with these special arrangements, the Commis-
517 sion at pages 228 and 229 of the same report said:

"So far as appears, none of the traffic transported by seatrain in railroad cars can be handled without the intervention of the Hoboken or the New Orleans & Lower Coast, or except in accordance with some of the extraordinary arrangements with those companies. Except as to the transportation of a comparatively small amount of liquid cargo in the ship's tanks, it is impossible for Seatrain to operate as it is intended to operate and as it is operated without the special arrangements with connecting railroads for the continuous carriage of freight in railroad cars and without cooperation of such connecting railroads, or to keep its carriage of railroad property in railroad cars distinct and independent from that of the railroad carrier as was found in the Munson Line case, supra, had been done by the water carrier."

Now, the distinctive localized nature of Seatrain's connections with the rail carriers, which is also a distinctive feature of its service, was the subject of the findings in 206 I. C. C. 328, at page 330, among these words:

"These vessels can handle cargo in railroad cars only between ports at which special loading facilities have been provided and such special facilities have been provided only at Hoboken, Belle Chasse, and Havana."

The objective of the seatrain plan of operation and its
518 public appeal because of its novel service are the subject of the following findings of the Commission in a finding at page 335 of the same report. And there are numerous other and additional findings of the Commission to the same effect in other decisions, such as in the Through Route and Joint Rate case, 226 I. C. C. 7, at pages 20 and 21, particularly.

I might say that in that case the order of January 28, 1938, was specifically limited to Hoboken, New Jersey, and Belle Chasse,

Louisiana, and when by petition of January 5, 1944, in this docket—25727—Seatrain asked that order prescribing routes change the words "Hoboken" and "Belle Chasse" to "New York" and "New Orleans," the Commission, upon the objection of the railroads, which raised a question of power, denied that petition by order of February 15, 1944. I think it is important to note that the Commission specifically denied that petition to extend its original order from Hoboken to New York and Belle Chasse to New Orleans. Also the orders against us in the car case are based upon similar findings, and specifically limits it to the route via Hoboken and Belle Chasse.

I might say that just as the lines for whom I speak are opposed to a holding which would seem to extend their obligation in respect of furnishing cars to other water carriers without further proof of public convenience and necessity, so are they also of the view that the certificate in its present form,
519 in referring to New York and New Orleans rather than Hoboken and Belle Chasse, may entail upon them obligations not heretofore imposed upon them by the Commission. In our view the Thames River case does not require that Seatrain's certificate should read from the Port of New York or from New Orleans.

We think that section 309 (d) where it refers to the use of the word "port" is comparable with section 208 (a) where it refers to territories, a word which has been interpreted, as we understand it, in the Carolina Carriers' case, 315 U. S. 475, and in the Crescent Express Lines case, which was decided by the Supreme Court on December 6, 1943, as confining the certificate to that which has been done, and I would cite this language from the Crescent case.

Mr. McCollister. Well, if your Honors please, I submit that Mr. Eshelman is arguing a question which is not here.

Chairman Patterson. Well, let him use his time any way he wants to.

Mr. Eshelman. "When the Commission requires the applicant under the grandfather clause to limit its future operations to the type of equipment and service previously offered, its acts within its power and in accord with the purpose of Congress to maintain motor transportation facilities appropriate to the needs of the public. S. Rep. No. 482, 74th Cong. 1st Sess. If there is a need for a different type of service for this transportation,
521 applications may be filed under Sec. 307."

For that reason we say that from the virtual outset of the inauguration of its service new legal questions have been presented concerning its place and status in the field of transportation. There is no need to cite the numerous proceedings, or to

attempt to detail the numerous legal questions which have arisen as a result of its novel character and peculiar method of operation.

The fact remains, however, that the scope and the nature of the issues involved in the various proceedings, and the effect of the various determinations from the rigths and liabilities of the various interests concerned, furnish eloquent and cogent evidence that the seatrain type of operation is so peculiar and individual, and is so different from that of other types of water carriage, as to justify the Commission in recognizing it as such and in limiting its rights upon the present application to the specific service in which it has heretofore been engaged, and limit its certificate to what it has actually done.

Commr. MAHAFFIE. Does it follow from that that you take the position that we have the right to modify or repeal the authority as might be attended by this order?

Mr. ESHELMAN. No; I have not addressed any of my remarks to the question of power, but rather my remarks proceed upon the assumption that if the Commission determines that it has
522 power, then we are saying that certainly this is a distinctive service as should call for a certification as to the service thereafter to be provided.

Comm. MAHAFFIE. You are rather steering us on to change the certificate; I thought maybe you would consider whether we could.

Mr. ESHELMAN. Well, personally I do not entertain much doubt about it.

Chairman PATTERSON. Did you protest the notice?

Mr. ESHELMAN. No. We didn't know about it. You see it is not required that an application go before everyone. They have a right apparently to present it and be heard on it, but I think the notice went out to the other steamship companies. I do not know that they went out to others except as the Commission might pass them out in the Secretary's office. We make no point about notice, except that it was general at the time we knew it.

Chairman PATTERSON. Mr Wettrick.

Argument of Mr. S. J. Wettrick, in behalf of Foss Launch & Tug Company

Mr. WETTRICK. May I inquire how much time I have, Mr. Chairman?

Chairman PATTERSON. Forty-five minutes.

Mr. WETTRICK. This morning I orally requested, from Mr. Porter, that arrangements be made whereby I would have at least one hour to present my argument, and I would like to
523 make that request now.

Chairman PATTERSON. When your present time is up at

12:30, which is about the time we take lunch, we will see how you are getting along at that time.

Mr. WETTRICK. The trouble is that one ought to know in advance, particularly when there are more things than he can cover in an hour, how much time he is going to have, so that he can be governed accordingly.

Chairman PATTERSON. Well, we will see at 12:30 whether you need any more time.

Mr. WETTRICK. Then I am going to proceed on the assumption that I will be allowed an hour.

Chairman PATTERSON. You may make any assumptions you care to.

Mr. WETTRICK. And arrange my argument accordingly. I may say, Mr. Commissioner, that this is the first opportunity that has been afforded me to present in detail our contention so far as the applications of the Foss Launch & Tug Company are concerned, and for that reason I was particularly anxious to be given sufficient time to fully present the argument.

The Foss Launch & Truck Company operates barges and tugs on Pudget Sound. It is engaged in what the Commission has referred to generally as barge-line service.

The Commission's certificate, issued to the Foss Launch
524 & Tug Company without consideration of the question that I propose to argue, as it did in these other cases, granted the right to continue as a common carrier in the transportation of commodities generally by means of non-self-propelled vessels, with the use of separate towing vessels. The company assumed from the certificate that was granted it that it had the right to transport commodities by means of barges and tugs in barge-line service in any manner and by any method.

And incidentally I might say that an application of the Marine Oil Transportation Company, which is a subsidiary of the Foss Launch & Tug Company, was considered at the same time and it was denied the right to engage in freight car ferry service on Pudget Sound because Division 4 found that it had not been operating at that time, I mean transporting freight in freight cars, and Commissioner Miller will probably recall that he objected to the idea of giving Marine Oil a separate certificate on the ground, as he stated, that the certificate that had been issued previously to the Foss Launch & Tug Company authorized it to perform service involving the transportation of commodities generally in freight cars, and hence that it was unnecessary to grant Marine Oil another certificate, being a subsidiary of the Foss Company.

As I stated, the Foss Company assumed that the certificate that had been granted to it authorized to engage in freight

525 car ferry service, as we refer to it for short, when a competitor, authorized in its certificate to transport commodities in freight cars, raised the question as to whether Foss certificate included that authority, and making the contention that if it did include the authority the Commission had erroneously granted it. Reply was filed with the Commission, and in due course it came up before Division 4, and Division 4, after consideration only upon the reply filed and of the petition and the original petition held that the right to transport commodities generally did not include the right to transport commodities in freight cars, and issued an amended certificate in which the company was authorized to transport commodities generally (except freight cars loaded or empty in the performance of freight car ferry service).

Now, gentlemen, does that sound right to you, to say that *that* a company can transport commodities generally, except freight cars? The freight car is not the subject of transportation, the freight car is used for convenience and economy only, and the commodities in the car are the subject of the transportation regardless of whether it is loaded or empty.

So the first suggestion I want to make is that if the Commission is going to adhere to its previous ruling in this respect, then I submit that in order to make the exception logical it ought

526 to be "except commodities contained in freight cars loaded on barges and transported by means of tugs."

Then you are getting at what the situation, or what the exception really ought to be.

Just to show you what comes up in that connection: Recently the Foss Company, which is authorized to transport explosives from Indian Island to Tacoma by a temporary certificate issued here in an emergency matter where the Navy Department required immediate service in taking some ten cars from Indian Island to Tacoma and ship them from Tacoma down to Mare Island to be loaded into ships and carried out into the Pacific, took some cars from Seattle, and mind you, the Foss Launch & Tug Company is authorized to operate by temporary certificate between Indian Island and Tacoma, so Seattle is nearer Indian Island, where these explosives were to be picked up, it is a better place for cars, a greater supply, and so before its amended certificate became effective it took these empty freight cars from Seattle to Indian Island; they were loaded with the explosives, and then brought down to Tacoma over a route on which it was authorized to operate. Immediately one of the competitors complained that we were operating in freight car ferry service, and the Assistant Director wrote a letter to the Foss Company, and wanted to know about this matter, and wanted to know what

rates were charged on the commodity, and I replied that in the first place the amended certificate which prohibits us from
527 performing freight car ferry service had not gone into effect at the time, and in the second case, because the transportation of the empty cars was merely incidental to the performance of the service, that it carried no commodities on which freight charges were paid, that they were merely taken to the point of loading and there loaded with commodities that the Foss Launch and Tug Company is authorized to transport, and taken over the route to Tacoma over which it is authorized to operate.

Now incidentally that is a good illustration of what happens when you apply rules too strictly and refine classification too strictly.

And let me say incidentally that Puget Sound is probably now the most active water transportation region in the world. On the islands of Puget Sound the Government has established ammunition depots, naval air depots, a big navy yard at Bremerton, there is an enormous amount of traffic moving in both directions, so much so that the two other carriers that are authorized to perform freight car ferry service only between certain specified points are unable at times to do the business, and the shippers ask the Foss Company to do it.

Mr. ROCKWOOD. I take exception to that; we haven't any record here that shows that.

Mr. WETTRICK. And we are confronted with the proposition that the Commission says we can't transport commodities in freight cars.

528 Now, that brings me to the point that I want to discuss with you. I think enough has been said by Mr. McCollister on the question of the power of the Commission to change a certificate after it has once been promulgated, and I do not propose to discuss that much now.

Chairman PATTERSON. You agree with Mr. McCollister?

Mr. WETTRICK. I do, and what I want to discuss with you is your power and authority under the Water Carrier Act, Part III, to deny a barge-line operator such as the Foss Launch & Tug Company the right to transport commodities in freight cars when it is engaged, as the Commission found and authorized it to do, in the transportation of commodities generally between all points on Puget Sound.

Commr. PORTER. In other words, you except to the classification that Division 4 has made, that there is a distinction between the barge company authorized to carry general commodities and a car ferry service which we have held to be a distinct and separate operation from the other?

Mr. WETTRICK. Yes.

Commr. PORTER. That is your question?

Mr. WETTRICK. I say, in the first place, that there is no distinction; that if there is a distinction it has no relation to the Act and that if it has any relation to the Act the Commission does not have the right under the Act to say that the company engaged in barge-line operations generally cannot transport com-
529 modities in freight cars, and I am going to come to that in a few minutes.

Now in order to develop that the way it ought to be developed, it will be necessary for me to say this, the Commission has relied in connection with water carrier cases to a considerable extent upon motor carrier cases. I think we can safely say that Division 4, and please understand that nothing I am saying is in criticism of the Division or of any members of the Division, if I question anything it is the action and not the motive; we are all trying to keep business going in this country and help out the war effort and to settle these things in a practical manner, so I want to submit some considerations to you. I haven't any doubt that Division 4 held up its decision on the question as to whether the Foss certificate authorizes it to engage in freight car ferry service until the decision of the Crescent Express Lines case was decided by the Supreme Court on December 6 last. It had been pending before the Commission ever since May or June, and I was wondering why this important question had not been decided, and I say that without any criticism, but a few weeks after the present decision came out from the Supreme Court, the case was decided as I expected as soon as I heard about the decision, and it was based on that case, a motor carrier case.

Now, gentlemen, inasmuch as it will be necessary for me to make the distinctions that exist between the two, let me say to all the members of the Commission what Division 4 said
530 upon that subject. In the Union Barge Line Corporation case, 250 I. C. C. 249, and I am going to quote this in full to let us get the background:

"The Transportation Act of 1940, which incorporated Part III in the Interstate Commerce Act, brought the general port-to-port services and rates of water carriers under our jurisdiction for the first time. Therefore——"

And let me see whether this was the present Division 4. Yes it was.

"Therefore, several novel questions are presented in the instant proceeding. In approaching those questions, applicant and the protestant intervenors at times rest heavily upon the conclusions of this Commission and the courts upon more or less similar questions which have arisen under Part II of the Act. We therefore deem it appropriate to point out that the regulatory prob-

lems sought to be dealt with and the objects sought to be attained by Part II were markedly different from those aimed at by Part III. For example, under the former, there were the problems of the operator without resources or permanency of operations, and the character of competition created thereby. Under the latter, the larger capital investment required alone largely prevents the occurrence of that problem. Trucking was a comparatively new element in our transportation economy, whereas water trans-
531 portation, of a more ancient lineage, has generally been a more stable industry. The vast network of truck lines, many operating over irregular routes, necessitates many restrictions and limitations, is not exactly duplicated among the carriers sought to be regulated by Part III, which part is replete with internal evidence of a more liberal policy of regulation on the part of Congress than that disclosed by Part II. Therefore, while points decided under Part II will be considered where informative, they will not necessarily be regarded as controlling under Part III."

Commr. MAHAFFIE. Of course you recognize that the Commission overruled Division 4 to some extent in that particular?

Mr. WETTRICK. Yes; I know, but not on this declaration of policy. Now, why do I call your attention to that, gentlemen, not that that statement of Division 4 is controlling? I think it is a correct statement and because I am coming to this point now, and I do not know just where to begin, but I will begin this way: this Commission at one time itself held that you did not have the power or the right to specify the type of vehicle that was used, and you knew that you later in this Crescent Express Lines case, limited the carrier to the transportation of six passengers in a Cadillac car—well, I do not say it had to be a Cadillac neces-
532 sarily, you could use any vehicle that could transport six passengers.

Chairman PATTERSON. They were Cadillacs?

Mr. WETTRICK. How?

Chairman PATTERSON. They were Cadillacs?

Mr. WETTRICK. Yes; they happened to be Cadillacs, and that is the case that went to the United States Supreme Court, and I think this decision ultimately hinged on it.

Now, what is the difference between—in addition to what the Division said here, let us consider some of the differences. The fundamental difference is that section 309 (a) of the Water Carrier Act says that any water carrier that is in bona fide operation on January 1, 1940, between ports or on certain routes shall be entitled to a certificate.

Section 309 (d) says that the Commission shall specify in the certificate the routes over which or the points between which the

water carrier is authorized to operate, and that is all it says. It does not say that the Commission shall specify the service to be rendered, as it does in the Motor Carrier Act. In the Motor Carrier Act the corresponding section says that the certificate that you shall specify the service to be rendered and the points between which or the territory in which it may operate.

Now, gentlemen, that is very, very important, because you are holding that you have the right to specify the service performed by a water carrier in terms of the type of vehicle used, and your holding that you have that right was based on the phrase of the Motor Carrier Act that is not found in the Water Carrier Act. Is that correct, or isn't it?

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Here is the Nudelman case, in which you had previously held you did not have the right to specify the type of vehicle used. You said:

"In view of the proviso in section 208 (a) of the Act, we are of the opinion that we may not restrict applicant to the use of vehicles of the sedan type. Limitation of the number of passengers to be carried at one time in any vehicle to six would be merely an indirect restriction of the size of the vehicles to be used."

Chairman PATTERSON. May we have that citation?

Mr. WETTRICK. That is 28 M. C. C. 91, and I was referring to page 93 there.

Commr. LEE. What is the name of the case?

Mr. WETTRICK. The Nudelman case. I did not give the full title, but it is labelled Irving Nudelman common carrier application.

And the protestants, who were largely railroads, asked the Commission to modify its prior findings so that any certificate issued applicants will contain limitations fully descriptive of the special service rendered, including the limitations to motor vehicles of the sedan type carrying no more than six passengers.

534

And the Commission said:

"Upon further consideration"—I might say the Commission, I mean Division 4, did there——

Commr. LEE (interposing). Wasn't it Division 5?

Chairman PATTERSON. 5 there.

Commr. PORTER. Four wasn't guilty there.

Mr. WETTRICK. Pardon me for making a mistake. This was Commissioners Eastman, Lee, and Rogers, in the Nudelman case. They said:

"Upon further consideration we are of the opinion that our prior construction of section 208 (a) was in error. Simply stated, under this section, we are directed to specify in any certificate issued under section 206 or 207 of the Act, among other things, 'the service to be rendered,' subject to the proviso that we cannot

restrict the right of a carrier 'to add to his or its equipment and facilities * * * as the development of the business and the demands of the public shall require.' In other words, we clearly have the power and duty to specify in any certificate the service to be rendered, except that we may not attach maximum limitations to the quantity of the service to be furnished."

And why did you hold that you had that power? Because the Act says that you shall specify the service to be rendered, and that is why you decided that you had the right to
535 specify the type of facility when previously you had said that you did not have that right, and remember that you have no such provision in the Water Carrier Act.

Now I assume we are all agreed that this Commission can perform only such functions under the Act as are conferred upon it, and if you are not authorized to specify the type of service to be rendered by a water carrier, and let me limit it in my case to a carrier operating non self-propelled vessels, with the use of separate towing vessels, you have no authority to specify the type or the method in which commodities shall be transported. There is nothing in the Act authorizing it, and since you cannot specify the type, you cannot make any distinction between the method or manner in which commodities are transported.

But let us go on with this Nudelman case just a little bit further. The Commission then refers to another case and says:

"We did not conclude in that case, however, that we were without power to restrict a carrier to the use of certain types of vehicles for the purpose of describing the service to be rendered."

See! The right to specify the use of certain vehicles for the purpose of describing the service to be rendered. "What we found was that we have no power to restrict a carrier by the terms of its certificate from expanding the quantity of its
536 service to meet the demands of the public."

Now the next paragraph, which is on page 94, says:

"With this exception, our power to specify in any certificate we issue the service to be rendered is complete. For instance, in Schwerling Common Carrier Application, 23 M. C. C., 459, we required the applicant carrier to maintain a schedule of not less than one round trip per hour during certain periods. In other instances we have found it necessary, in order to specify definitely the character of the service to be rendered, to restrict a carrier to the use of certain types of equipment."

Now, I do not want to overemphasize it, but I call your attention to the fact that you have said over and over again that it was because of the authority given you or the duty imposed upon you to specify the service to be rendered that you decided these cases.

Commr. MAHAFFIE. Mr. Wettrick, if I follow you correctly, the

force of your argument would lead to the conclusion that a restriction to a general towage is quite improper, that anyone entitled to tow would be entitled to handle traffic other than by tow-boats. Am I correct in that?

Mr. WETTRICK. Well, it may cover that.

Commr. MAHAFFIE. In the Crescent certificate, which has been litigated and which as I recall was restricted to towing freight, it permitted the Crescent to engage in handling
537 traffic generally in the area it is entitled to serve, or would, would it not?

Mr. WETTRICK. Well, it might. I say there is nothing in the Water Carrier Act which prescribes anything else as a condition for the issuance of a certificate except that it shall have been in operation on January 1, 1940, over the routes and between the points for which it seeks a certificate.

Commr. MAHAFFIE. Have you any applicants who have been limited to towage in the Puget Sound area?

Mr. WETTRICK. Oh, there are quite a number of them that are engaged only in the general towage business.

Commr. MAHAFFIE. And they have certificates that purport to authorize only that, do they not?

Mr. WETTRICK. Well, their certificates are the same as that of the Foss Company, authorizing them to transport commodities generally.

Commr. MAHAFFIE. They are not exclusively towers, then, I take it?

Mr. WETTRICK. Well, some of them are exclusively towers; some of them do not even have any barges; they tow barges for others.

Commr. MILLER. Well, as I understand your contention is that they—just that we just could not limit them to transporting in a barge with a separate towing vessel; they could transport as they pleased?

538 Mr. WETTRICK. Well, I think that may be the logical result.

Commr. MILLER. Is that your contention?

Mr. WETTRICK. That may be the logical result of what I am arguing, but let me say this, gentlemen, I am only taking this position, that this Commission has no right to deny the Foss Company, which is authorized to engage in the transportation of commodities generally between all points on Puget Sound, to deny it the right to transport in such service commodities contained in freight cars for convenience and economy.

Why, the anomaly of such a situation is indicated by this: During the past year the Foss Company was under contract with the Navy to transport coal from the Milwaukee Railroad slip in Seattle, or rather from Seattle, and that is the slip that was used,

to Indian Island, where the Naval Air Station has been established by the Navy, and in order to carry on that service after the certificate was amended it was necessary for the Foss Company to unload the coal at the slip in Seattle and put it in bulk on the open scow and take it over to the Naval Air Station and unload it there, instead of doing that the more economical way of running the cars on the deck and taking them over there and unloading the coal from the cars.

Now, restrictions like that come up every day. If I had the time I could mention numerous of them, but we are
539 discussing a legal question here, not the facts.

Commr. PORTER. Do you use your barges interchangeably for car ferry and for general cargo?

Mr. WETTRICK. We do not. You can't use a barge to transport freight cars unless it has tracks on it, but that is relatively a simple matter in some instances. Gentlemen, I am not saying or even intimating that you can run freight cars onto a barge unless it has tracks on it. I am not saying that there isn't some difference between a barge that has tracks on it and one that does not. There are barges equipped with hopper bottoms or other means of unloading commodities that are transported in bulk, but are you going to issue a certificate for every such service performed by a barge line? I take the position that the unit of service involved, so far as the Foss Company is concerned, is the barge-line service. That is what it has performed for fifty years, that is what it was performing on January 1, 1940, and that is the business it performs up to the present time. And I do not care how much of a distinction you may find exists between the transportation of commodities in cars and transporting them in bulk on the open scow or otherwise; I say it is still barge-line service, and inasmuch as the Act does not give you the power to specify the service to be rendered, you have no authority to make a distinction between the method in which this freight is
540 loaded or transported between any points on Puget Sound.

Chairman PATTERSON. Do you haul freight cars in the course of your normal operations?

Mr. WETTRICK. We are not out there transporting freight cars, and the reason that we are not, Mr. Commission, is that at that time there were two, as there are now, two others in the field transporting freight in cars under joint rates with the transcontinental lines. The Foss Company did not have such joint rates as I have indicated before. Its car ferry business was carried on formerly by a subsidiary, of which Foss owned all of the stock, known as the Marine Oil Transportation Company, but there was so little business that the Foss Company, being the largest tow-boat operator on Puget Sound, referred to the other

carriers that were operating barge service, and actually performed with its barges and its tugs a part of the business for the Puget Sound Navigation Company under a contract or for-hire arrangement. But when with this war the business increased to such an extent that numerous demands were made upon it and it wanted to get into the business in order to continue the business that its subsidiary, the Marine Oil Transportation Company, had previously performed, when Division 4 said "You haven't any right to do that," and limited the certificate accordingly.

Now, in this Nudelman case the Commission gives numerous illustrations of service that it specifies, and then it says
541 this:

"Thus, in numerous cases we have specified, or in effect specified, certain types of vehicles in describing the particular service to be rendered under the authority granted.

"Because we have the power to restrict a carrier to the use of certain types of vehicles, in specifying the service to be rendered, it does not necessarily follow that we should in all cases impose such a restriction, for the circumstances do not always warrant it. Each case, of course, must be decided on its own merits."

Now another important question that would arise here is this: If the Commission should still be of the opinion that the Foss Company does not have the right to perform freight-car-ferry service, I would say that the Commission is in error on the basis of the provision which says that a carrier shall have a right to add to its equipment and facilities as the needs and requirements of the business may require. The Foss Company is engaged in the barge-line business. Why should not it have the right in order to improve its service to the public to put rails on some of the barges, if it didn't have enough already, as it does have. As I say, it was performing in for-hire arrangements or service for other carriers that the Commission authorized to perform such service. Would it be doing anything more than adding
542 to its facilities and equipment as the needs of the business require by putting some tracks on a scow and running the cars on there and transporting the commodities in the cars if that is what the present-day conditions require?

And that leads me to say something about this Crescent Express Line case, in which the latter question was more particularly discussed by the Supreme Court, and I want to refer to just two of these slogans, statements that have actually become slogans or catch phrases in the consideration of these questions, which reminds me that not long ago, Justice Holmes or Justice Cardoza made the statement that some slogans or catch phrases have postponed investigation for fifty years because they are just accepted without question, and the first one I want to mention is this one

that is always cited on the authority of the Noble case, that "to authorize the appellant to change the business of carrying passengers by bus would alter the position which is occupied in the transportation system. * * *."

I say it would not do that in this case since the Commission has no power or authority to specify the service to be rendered or the type of vessel to be used, the minimum unit that must be accepted at least is the barge-line operation or service. That is what you say Foss was authorized to perform in any manner on the grandfather date.

Commr. MAHAFFIE. If we have no authority as to service,
543 would you say that Foss under its certificate could also handle passengers, if it wanted to?

Mr. WETTRICK. I thnk it could handle passengers if it wanted to. But that is idle speculation, because it has been in operation for fifty years, and never has handled any; never would handle any.

Commr. MAHAFFIE. Yes; but it could if it wanted to put in facilities and handle passengers under its present certificate?

Mr. WETTRICK. Well, I think it could, but I am not going to that extent.

Commr. MAHAFFIE. Well, I was just trying to extend your argument.

Mr. WETTRICK. May I say that Division 4 has been quite versatile in finding ways of making distinctions, and if I were concerned with it I think I could suggest some which might be used with the section of the Act that defines common carriers, talks about classes of commodities transported, and so forth. I am leaving that to the Commission; if Congress has left it wide open, I can't help it. What I am saying is that you cannot say that the Foss Company under the Act cannot engage in barge-line service by the transportation of commodities in freight cars, and that is all I say. And we are not going into the passenger business or any other business and we are not going to take the business away
from the two other companies that are opposing us, as we
544 did not when the field was wide open and we had an opportunity to do whatever we wanted to do. We want to be in a position to render a service when it is necessary and in the public convenience, as well as the theory of the Act which contemplates that you shall consider the changing position of the transportation system. Before you consider whether a business is changed you must first determine what that business was, and I say that the Foss Company under the Act is authorized to transport commodities in freight cars, and hence that for it to do so does not constitute a change in the transportation system.

Commr. PORTER. Well then I understand too from your argu-

ment that you draw a distinction between the grandfather rights, so-called, and where a carrier has come here and asked for a certificate of public convenience and necessity?

Mr. WETTRICK. Well, I think there would be a distinction there.

Commr. PORTER. Because the section relating to public convenience and necessity speaks about the ability properly to perform service proposed.

Mr. WETTRICK. Yes.

Commr. PORTER. And so so on.

Mr. WETTRICK. You have to take all of those things into consideration, Mr. Commissioner, and I would think you would be subject to the same restrictions in limiting the type of service as you are with a carrier operating under the grandfather
545 clause, you have got to make additional findings as to public convenience and necessity, and willingness.

Now, the Supreme Court said in this case that:

"If the holder of a grandfather certificate for this distinctive door-to-door service could develop his operations so that they would be substantially those of a bus line, the ability of the Commission to carry out its duties of regulation in the public interest would be seriously impaired."

Now, Division 4 seized upon that situation as giving a reason why the Foss Company should not perform freight car ferry service, and I pointed out in my petition for reconsideration that for the Foss Company to perform freight car ferry service in barge-line operation is simply to continue to perform the kind of service which it has been performing. Why would that raise any difficulty so far as the regulation is concerned?

"Since Section 308 requires the Commission to specify the service to be rendered, this could not be done without power also to specify the general type of vehicle to be used."

Commr. PORTER. Do you mean 308?

Mr. WETTRICK. Section 308, that is in the Federal statute, it is
308 there; 208 in the Motor Carrier Act. That is right. I do not know why it is, but that is correct.

546 Now, the Supreme Court makes this final statement in this case:

"When the Commission requires the applicant under the grandfather clause to limit its future operations to the type of equipment and service previously offered, it acts within its power and in accord with the purpose of Congress to maintain motor transportation facilities appropriate to the needs of the public."

That is the Motor Carrier Act, and what is contained in it, and to that extent only, so that that statement cannot be loosely applied to a situation in connection with a water carrier.

And here is this catch phrase, "The statute, we have said, con-

templated 'substantial parity' between future and prior operations."

Chairman PATTERSON. We will now recess until 2 o'clock.

(At 12:30 p. m. a recess was taken until 2 p. m.)

AFTERNOON SESSION—2 P. M.

Chairman PATTERSON. Mr. Wettrick; you may have fifteen minutes to complete your argument.

Mr. WETTRICK. Thank you, Mr. Chairman.

Argument of S. J. Wettrick, in behalf of Foss Launch & Tug Company (concluded)

Mr. WETTRICK. When we adjourned, I had just made reference to this oft-repeated phrase quoted in the Crescent Ex-
547 press Lines case by the Supreme Court to the effect that the statute contemplates substantial parity between future and prior operations. I referred to that this morning as a catch phrase and I want to just call your attention to this, that in the Alton case, and that is where that expression was first used by Justice Douglas, the Commission had issued a certificate authorizing a motor carrier engaged in the transportation of vehicles by the drive-away method to operate to all points within a State, although a few points had previously been served. In other words, in that case where that expression was first used the question was whether the Commission had not gone too far in granting a motor carrier operating rights rather than as here, whether it had limited it too much. The railroads in that case opposed the granting of a certificate covering the whole State when only a few points had been served, but Justice Douglas in holding that the Commission had not gone too far in granting motor carrier rights, said:

"Certainly we cannot say that it was a wholly inappropriate method for creating that substantial parity between future operations and prior bona fide operations which the statute contemplates."

Now, that quotation has been repeated in the Noble case, also
tions and prior bona fide operations which the statute contem-
on it further with regard to its application to the present
548 case is this: that substantial parity between prior bona fide operations and future operations as applied to the Foss case means parity between the barge line service in which it was engaged heretofore and which it contends under the law it is entitled to continue in the future. In other words, the substantial parity has reference to parity in such service as the Act contemplates or refers to or covers.

Division 4 in its decision said that freight cars, freight car ferry service is a separate and distinct service. Commissioner Porter referred to that this morning. It may be in a sense a separate distinct service as a matter of fact, but it is not a separate and distinct service as a matter of law under Section 3 of the Act. Division 4 said——

Commr. LEE. You mean Part III.

Mr. WETTRICK. Part III. I say there may be some differences in the physical operation as a matter of fact, but it is not a distinct service under the law, and if the contention I made before noon is correct, the Commission has no right to treat it so. Division No. 4 said: "It has been recognized as a separate and distinct service in the Act and by us he later refers to Section 303 (f), which exempts car ferry service, floatage, lighterage, and towage within terminal areas from regulation. That is what section 303 (f) does.

Now, Division 4 said that that is a recognition that it is a distinct service. Well, I submit that that section merely exempts those operations in terminal areas from regulation, which does not make it a separate and distinct service so far
549 as transportation is concerned. Division 4 said that we also held in other cases—Puget Sound Navigation Company, Drummond Lighterage, Marine Oil Transportation, the subsidiary of the Foss Launch & Tug Company which I mentioned this morning, each one of which had been engaged so far as barge service is concerned only in the transportation of freight cars by barges, and did not want to go into any other service, asking only for authority to engage in the transportation of commodities contained in freight cars, and of course that is the authority the Commission gave them. Now that is not a precedent which shows that there is a distinction between that and the transportation of commodities generally.

Commr. MAHAFFIE. But if I understand you correctly, the certificate would permit all of those three to engage in the transportation of package freight or passengers if they liked.

Mr. WETTRICK. The certificate that they have now would not.

Commr. MAHAFFIE. Yes, but in terms, as I follow your argument, and if I follow it correctly, that certificate cannot validly be so limited, and with a certificate outstanding they are entitled to handle any kind of freight they like.

Mr. WETTRICK. Well, that is what the Act says, Mr. Commissioner. Now if Congress did not cover the situation as it should, as fully as it should, Section 309 (a) I repeat, says that if a water carrier has been operating over certain routes it shall be
550 entitled to a certificate ipso facto, and (d) says that the

Commission shall prescribe the routes or the points between which it may operate.

Commr. MAHAFFIE. You feel it is perfectly legitimate for every firm that is operating on Puget Sound to start handling package freight or barge freight?

Mr. WETTRICK. We have no objection to them doing that; that situation has existed for thirty or fifty years. They all live there together. As I have indicated before, the Foss Launch & Tug Company even before we had an act covering the situation turned business over to the others and carried on the business for them as their competitor. It is not going to be ruthless competition if the Foss Company can continue to transport commodities in freight cars. We do not think that it is right or that the Act intended that simply because on January 1, 1940, they were not doing that kind of barging, that they should forever be denied the right to do it.

That is our point in connection with that.

Now, with regard to classifying water carriers. Division 4 referred to section 304 (c) which authorizes you to classify water carriers, and the implication there was that that gave you the right to make the classification as between commodities transported in freight cars and those transported otherwise. Now I do not think that that requires much argument to convince anyone that that cannot be so. The right to a certificate is de-
551 terminated by the substantive provisions of section 309 (a) and (d), and you certainly have no right to classify out a carrier as entitled to a certificate. That was not the intention. After you have authorized the carriers that are entitled to certificates under the Act, then you have a right to classify them according to kinds, for reports, and things of that kind.

Commr. PORTER. Well, is that part—isn't that part which says "the Commission may establish from time to time such just and reasonable classifications of groups of carriers included in the terms 'common carrier by water,' or 'contract carrier by water,' as the special nature of the services performed by such carriers shall require; * * *," that is perfectly proper, isn't it?

Mr. WETTRICK. Yes; the services performed under the authority of the certificate that you gave them and under the scope of the certificate.

Now, I call your attention to the fact that you have not classified water carriers as you did motor carriers. You said in your last Annual Report, or the one before that, that you had created five classes, one of which was non-self-propelled vessels with the use of separate towing vessels, which is the one within which Foss would fall. Now, if you have a right to classify, and understand I am not questioning, I am not arguing one way or the other,

it is nevertheless a fact that you did not classify to the place to where you cover freight car ferry service, and even in this
552 Mechling case here in 250 I. C. C. you said:

"Applicant furnishes transportation by barge, and we will limit his service to that type of operation."

Now, it is suggested that you go further and state the kind or the manner or the type of equipment that shall be used in transporting the commodity. A freight car is no different than any other container. Suppose the Foss Company should start in gathering up business by the truckload and loading the trucks on barges and taking them over to Bremerton, would they have a right to do it? Your Honors, let me say in conclusion, the Foss Launch & Tug Company is now probably the biggest tow-boat operator and barge operator on Puget Sound, it probably does nearly 50 percent of the business. It started from a small business. It is now operated by three brothers whose mother was "Tug Boat Annie" of the movies, and it has been written up in the Saturday Evening Post. Old Andrew Foss and his wife went to Tacoma, Washington, and with a few dollars they had scraped together they started renting launches to picnickers cruising around the islands on Puget Sound, and from that the present business has developed. That is the reason it is still called the Foss Launch & Tug Company, because that is what they had originally started out with, the launches. I mention it only to ask you to contemplate what the situation now would be with the Foss Launch & Tug Company if fifty years ago
553 the act such as your Honors contend for had been enacted and it had been held that they must forever confine themselves to the renting of sailboats or launches because that is what they were doing on January 1, 1940, or the grandfather date fifty years ago. Thank you for your consideration.

Chairman PATTERSON. Mr. Rockwood.

Argument of Fletcher Rockwood, in behalf of Puget Sound Navigation Co.

Mr. ROCKWOOD. Mr. Chairman, I asked originally for 45 minutes. Mr. Wettrick's time was increased to an hour, and I have to answer briefly both sides.

Chairman PATTERSON. You may have an additional fifteen minutes.

Mr. ROCKWOOD. I appear here, your Honors, for the Puget Sound Navigation Company, and I probably appear also for Division 4, which has been attacked by both counsel very strenuously.

Commr. PORTER. We are glad to have somebody appear for us.

Mr. ROCKWOOD. I thought they should be represented. The Puget Sound Navigation Company is known as the Black Ball

Line, and holds a certificate under the grandfather clause, Part III of the Act, to operate as a common carrier of passengers and freight by self-propelled vessels between 17 named points on Puget Sound, and likewise to operate car-ferry service by non-
554 self-propelled vessels and separate towing vessels, between Seattle and three ports on the western side of the Sound, Bremerton, where the Navy Yard is located, Ostrich Bay, and Keyport, there being Navy establishments at both those points.

As I say, Puget Sound Navigation Company, in their certificate under the grandfather clause and as appears from the decision in their docket, they have been engaged in car-ferry service between those ports, for many, many years prior to 1940.

Foss Launch & Tug Company filed an application for a certificate under the grandfather clause of Part III, and obtained a certificate which permitted them to engage as a common carrier in the transportation of commodities generally by the use of non-self-propelled vessels and separate towing vessels between all points on Puget Sound.

I want to point out right now, for fear I will overlook it, the fact that the application of Foss Launch & Tug Company for a certificate asked for permission to transport commodities generally, except commodities not adaptable to transportation by towage in scows. Their own application was limited.

The Foss business, as appears in the record, and incidentally I am confined to the record because I do not have the prior family history of the Fosses, as Mr. Wettrick has, but must rely on the record made at the hearings before the Examiner. The record shows that prior to and on January 1, 1940, Foss Launch &
555 Tug Company was engaged in towage business handling scow loads of material such as rock, sand, coal, wood pulp, cement in specially constructed hulls, and barges, bulk oil in special bulk oil barges, and that was all they were doing. Excuse me; they were also towing logs; they were towing hog fuel, bulk sulphur; they were doing a general towage business on Puget Sound, but they were not engaged in car-ferry service.

The Foss Launch & Tug Company had a subsidiary, the Marine Oil Transportation Company, a wholly owned subsidiary, which also filed for a certificate to continue as a common carrier by car-ferry service on Puget Sound and also at Gray's Harbor.

The record made in the Marine Oil case which had been consolidated at the hearing with the Foss record, shows that on January 1, 1940, they were not engaged actually in car-ferry service on Puget Sound. They were, however, at Gray's Harbor, which is on the Coast at Aberdeen, Washington, and Marine Oil Transportation Company was given a certificate to operate at Gray's Harbor, where they could satisfy the grandfather clause, but

were denied a certificate to operate in car-ferry service on Puget Sound, because they were not operating in that service on the grandfather date.

Puget Sound Navigation Company was not named as a competitor of Foss in its application. In its application Foss listed some 30 other tug-boat companies and tug-boat companies all over that part of the Northwest, in that tow-boat area,
556 as competitors but Puget Sound Navigation Company was not listed as a potential competitor, indicating that Foss Launch & Tug Company did not at that time contemplate going into a business which was competitive with the Black Ball Line.

Likewise, Drummond Lighterage was not listed as a competitor in the Foss application. However, the Marine Oil application which was signed by the same official, Mr. Foss, vice president of the both companies, in the Marine Oil application where they sought car ferry rights on Puget Sound, both the Black Ball Line and the Drummond Line were listed as potential competitors and were given notice of the pendency of the application. Puget Sound Navigation had no notion that Foss intended to enter the car-ferry field until about April 1, 1943. I am reciting facts now which are recited in the petition for reconsideration which was filed by Puget Sound Navigation Company.

At about date the Puget Sound Navigation Company then learned that Foss intended to go into the car-ferry business and that it had requested the transcontinental lines to join in the publication of rates naming Foss as one of the participating carriers to Bremerton, as being a common port, ports served by the P. S. N., and likewise one port served by Drummond as I recall. When that occurred Puget Sound Navigation filed its petition for reconsideration because it was deemed obvious that Foss
557 had no such rights, and in the exigencies of the case it was desired to have the question determined, the way to have it determined was by refegence back to the Commission, and asked to define the language which it used in the Foss certificate rather than to wait for what might be considered a violation of the certificate and then attempt to enjoin the violation or to proceed in Federal Court in some way. It was more expeditious to come to the Commission, which we did.

The Commission reopened the Foss case by its order of July 8, and without receiving further evidence and without apprising the parties at this time, published the second decision of December 18, 1943, which did restrict the Foss certificate as Puget Sound Navigation Company had requested.

Thereafter Mr. Wettrick, counsel for Foss, filed a petition and brief for further consideration, and we filed a reply to that brief

which I believe is the only printed brief we have in this docket, and Mr. Wettrick's application was denied.

Then way late in June, just about the 1st of July, Mr. Wettrick applied to ha' this case reconsidered with the Seatrain case. On July 5, I learned that it was set for argument, but I had no notion of the points which the Commission was to consider and I assumed that the only point was as to the propriety under the facts of the order of December 18.

There are two points which have been discussed by counsel.

558 First, the point of the jurisdiction of the Commission to modify the certificate, and Mr. Wettrick has adopted the argument made by counsel for Seatrain, and I feel that I must answer the argument first made this morning by Mr. McCollister personally. I did not know that this point was to be raised until I arrived in Washington yesterday, and I must apologize for the very poor argument which I will make on the point, but I hope you will understand that I have had no chance to brief the matter at all, and I only had the opportunity to read Mr. McCollister's brief.

He relies in large measure in his brief and in the argument which he made this morning on the Smith Brothers case in 3 M. C. C. 465, where the Commission held that the power given by statute in section 208 (a) to attach terms and conditions and limitations to a certificate does not authorize the inclusion of a condition which will automatically terminate or result in a forfeiture of the certificate upon the cessation by the carrier of operations. And the Commission held that that was true in the light of the specific language in section 212 (a), which provided the specific procedure for termination.

Now that is very important language, very pertinent language, following the language upon which counsel relies. The Commission said "in expressing the views stated above, we do not desire to be understood as holding that a certificate obtained by fraud, or misrepresentation, or one issued in error by this

559 Commission, may not be changed or revoked without proceeding under section 212 (a)."

Commr. LEE. That language has been changed. There is another print of that report in which that language is specifically changed.

Mr. ROCKWOOD. I am sorry. I read the bound volume yesterday afternoon and copied it from that.

Commr. LEE. When we discovered that we amended the report and changed that language. It takes out the word "error," at least I remember that much about it. I can give you the citation.

Mr. ROCKWOOD. I will, of course, want to read it, because that

is the language that is quoted in counsel's briefs and in the language in the printed report which I read, but that change, with the elimination of the word "error" I do not think will substantially change the argument which I am about to make.

Mr. Wettrick said in his argument either this afternoon or late this morning that Foss thought it was going to get car-ferry rights. Now if Foss thought it was going to get car-ferry rights at the time of the hearing, Foss was guilty of fraud and misrepresentation. As a matter of fact, I do not think he ever expected to get car-ferry rights, as I will show from his own testimony, so that he was not in fact guilty of fraud or misrepresentation, and I repeat that Foss, if that is what he sought, if that is what he intended to get, if that is what he thought, then he was
560 guilty of fraud and/or misrepresentation. Furthermore, I do think that if the certificate is interpreted as Foss would now interpret it to include the car-ferry right, then it was issued in error. And despite the fact that the language has been deleted, I believe that the Commission does control its own proceedings, and if it has erroneously and as a matter of law erroneously issued an order, it has the right to correct its own errors and not leave the parties to resort to Federal Courts to correct the errors which have been made.

Now, as I say, I do not believe that Mr. Foss is guilty of fraud or misrepresentation, and I do not charge him with perjury, of course. There is not the slightest notion in my mind that he ever expected to get car-ferry rights, consequently there was no fraud or misrepresentation. I will refer to his own testimony in a few minutes.

Now I say that this order, if it is interpreted as Mr. Wettrick would have you do it, it is erroneous as a matter of law. First, because there is absolutely no evidence in the record to support the findings that he is entitled to a certificate for car-ferry rights, and second, the testimony of Mr. Foss himself is directly opposed to a finding that he had car-ferry rights. Finally, the order was issued without compliance with the section of Part III which requires notice as the Commission shall specify to known competitors, and if this was to give car-ferry service rights we were
561 certainly no competitor because we were listed as such in the Marine Oil Transportation case, and his own testimony shows in this case that Mr. Foss was aware of the car ferry operations of Puget Sound Navigation Company and Drummond Lighterage on Puget Sound. So the order issued was without notice to us, without any opportunity to us to know that we were considered a competitor and to appear at the hearing if we were known to be such and see to it that the certificate orginally granted would be proper and limited, I assert is another ground on which

it would be asserted that this order is erroneous as a matter of law. That being true, I believe that the Commission has the authority to correct its own errors before rather than require the parties to resort to Federal Courts to have the errors of law in the orders themselves corrected.

Now, on the merits of this case, that is on the question whether, under the facts, the certificate should now or in the first place have been restricted so that Foss Launch & Tug Company shall not have the right to engage in car-ferry service. Mr. Wettrick has argued that under Part III of the Act this Commission has authority only to limit operations in two respects; first, with respect to the routes over which the operation is to be carried on and, second, with respect to the ports which may be served.

Now, he is driven to the obvious conclusion, which Commissioner Mahaffie suggests that if that is true then a car-
562 rier which is a common carrier on January 1, 1940, engaged, let us say, solely in passenger service, is entitled to a certificate to operate between the same two ports between which it operated on the grandfather date and over the same route, and that is the only limitation which can be placed on the certificate, and that carrier which up to that time had engaged only in passenger service can branch out and give Seatrain service, freight service of any kind, carrying any commodities in any kind of equipment which it wishes. There is absolutely no limitation except that the carrier should have been a carrier by water on January 1, 1940. That being true, it is entitled, according to Mr. Wettrick's argument, to an absolutely unlimited certificate.

Now that certainly is not the law as this Commission has understood it. Every case, I venture to say, which has been decided under Part III of the Act, found in volume 260 of the reports and in 250 of the reports, attaches some limitation to the character of the operation by the carrier getting a grandfather's certificate other than Mr. Wettrick has suggested. Mr. Wettrick is perfectly willing to have you classify him if you do not classify him out of the car-ferry business, but his argument leads to the inevitable conclusion that you have no power to impose any limitations whatsoever on the type of service which the carrier can render under a grandfather certificate if it was in fact on
563 the grandfather date a common carrier.

The catch phrases——

Commr. SPLAWN. The barges used by the Foss Company, did they have the same kind of facilities for railroad cars like the barges that your company uses in ferrying the cars; railroad cars?

Mr. ROCKWOOD. The record does not speak on that subject because we were not mentioned—our type of equipment. I believe as a fact that they are car floats of the same general class. It is

true that the Puget Sound Navigation Company has chartered from Foss at times equipment the legal title to which is in the Foss Company and has used some of the equipment which Foss has owned from time to time.

Commr. SPLAWN. May I ask, if the company gets certificate to operate the common carrier barges and these barges are subjected to different kinds of uses, can we under any provision of Part III spell out a limitation on the uses of the equipment and put that limitation in the certificate?

Mr. ROCKWOOD. Why, I believe that you can. Take a situation such as we find on the Columbia River. There there are tanks equipped to handle bulk petroleum going up the river loaded with gasoline, and come down the river loaded with sacked grain. There has been that operation at various times. If on the grandfather date they had never handled bulk grain, and had handled only petroleum in bulk, the mere fact that the equipment is
564 susceptible of use in the handling of grain I do not believe would give the carrier on the Columbia River the right to handle grain. He may apply for a certificate of convenience and necessity and acquire the right to handle grain, but it would not give any grandfather rights to handle grain. So the mere fact that the equipment is susceptible of uses other than that to which it is being put on the grandfather date does not, I believe, give the carrier the right to extend its business beyond that, beyond the limits which it had on the grandfather date.

To elaborate on that point just a moment, a carrier may have equipment, a vast amount of equipment, capable of handling anything that is proffered to it, but we will say that then on the grandfather date for some reason or other it has ceased to operate as a common carrier. The fact that it has equipment which it can use to handle an unlimited variety of commodities does not entitle it to certificate to operate and handle those commodities, because it must have been operating in that business on the grandfather date. So I do not think that the character of the equipment is a proper measure of the rights which the carrier may have under the grandfather clause.

Chairman PATTERSON. The company, as I understood Mr. Wettrick, has held itself out from time to time to do anything, that it started out taking people on picnics, and wound up in the general freight business. Under that statement of facts, assuming that that is a correct summary of the facts, could it be
565 said that Foss has held itself out to carry anything that the equipment could be adaptedd to, and therefore in such a certificate we would not be justified on that statement of fact limiting them to just what they were hauling on the grandfather date.

Mr. Rockwood. I would answer that in this way: In the Marine Oil case, the Marine Oil Company held itself out by published tariffs as being prepared to render car-ferry service, but your Honors found that Marine Oil Company was not in fact rendering service. So the mere holding out is not sufficient to justify the issuance of certificate. I do recognize this, that if a carrier is engaged right along in handling a wide variety of commodities it is entitled to a certificate to handle commodities generally even though on January 1, 1940, it handled on the day before or the day after only a very few of the commodities in which it was currently engaged in handling, but the mere holding out is not sufficient to justify the granting of a certificate. There has got to be currently engaging in the business which the certificate covers in order to justify the granting of a certificate under the grandfather clause.

Commr. Lee. Well, wasn't Mr. Foss actually engaged in a sufficiently wide variety of operations to justify Division 4 in holding it was a common carrier?

Mr. Rockwood. Yes.

Commr. Lee. But it just didn't happen to be handling
566 goods in railroad cars.

Mr. Rockwood. It was handling commodities in bulk and in open barges, as its president said they were not interested in package goods or valuable cargo, they had no interest in those, they were interested only in commodities which could be loaded in bulk and were not susceptible of damage by rain and sea water, commodities like coal, rock, sulphur, hog fuel, sand and gravel, commodities such as that. That was the business they were engaged in and they were not engaged in the handling of any package goods, and they did not want them, they don't compete, they simply say in the record they were not competing for that type of business. They didn't want it. I can quote their own counsel, who was not Mr. Wettrick at the time, another counsel, and he was explaining the use in the application of the term "commodities generally," he says:

"The reason that that term is used in the application is because it would be impossible to list specifically all of the commodities which have been and which could be carried by scow load.

"However, there are numerous commodities which are not adaptable to transportation by carload in the manner in which our transportation business has been described by Captain Foss; so that that type of commodity is not carried, and we are asking for no authority to carry it.

"Specifically, the witness has stated that they are not
567 interested in carrying mixed cargo, and it is only entire carloads of commodities that they are interested in carry-

ing. I don't know of any other way to word the application to cover all the business they are engaged in and still not make it so broad as to state we transport anything; because we don't do that."

Well, that was the way their own counsel at the hearing summed up the scope of their application to the Examiner. Now——

Commr. SPLAWN. Loading from freight cars to the barge, loading it on freight cars, would that be similar to this description or more in the nature of package, valuable articles?

Mr. ROCKWOOD. Well, it is of course anything that is susceptible of transportation in freight cars; it can be handled in freight car ferry service. I have no doubt that a vast number of kinds of plate steel for ship construction, and for ship repairing, is so handled. Also I have no doubt that a vast amount of material in the way of high-grade manufactured commodities go over there, a great deal of food commodities, to Bremerton for the thousands and thousands of industrial population there at the Bremerton Navy Yard. It is a high class traffic as well as a low grade articles and they go over there in freight cars, everything needed for a community of that size goes across the Sound in freight cars I have no doubt.

658 Commr. SPLAWN. But so far as the Foss Company is concerned, so long as it is in a sealed car or in car, it doesn't make any difference whether it is low grade or high grade traffic, so far as the handling is concerned?

Mr. ROCKWOOD. So far as the handling is concerned, that is right. So far as the revenue is concerned, it makes quite a bit of difference because it is handled under joint through rates with the car-ferry company as a participating company taking a division, and the greater the revenue, the better division they get, of course.

Mr. Wettrick has talked about the catch phrases in the Supreme Court. Generally the Supreme Court has said in these two cases that have been cited, the Noble case and the Crescent case, that under the grandfather clause, they were speaking of Part II of the Act, the applicant has a right to a certificate only such that will permit him to do business, not to enlarge and extend his business beyond the pattern which it had had on the grandfather date, and not to alter the position which the applicant had in the transportation system of the country on that date.

Now Foss—if there is any limitation on the grandfather clause in Part III, as you have held in other cases that you have decided under Part III, if there is a right to impose limitations, then where must the line be drawn? Obviously it is drawn at the place

569 where the catch phrase of the Supreme Court puts it, it is drawn at the point which will permit the carrier to con-

tinue in the business in which it was engaged on the grandfather date, but not to enlarge its business and expand beyond the scope of business which it had on that date.

Commr. SPLAWN. Well, is this the law, that a common carrier by water cannot expand or grow, or solicit business——

Mr. ROCKWOOD. Oh——

Commr. SPLAWN. Add equipment?

Mr. ROCKWOOD. No; of course not. I am sorry if I have been misunderstood. Specifically and definitely, the general scope of the business. You can add equipment, you can go out and solicit more business, you can become prosperous, you can have a small beginning, if a carrier is engaged in the handling of, well, we will take our own case, Puget Sound Navigation Company. We handled package goods by, as the report shows, by self-propelled vessels between certain points on Puget Sound. Well now, if the business at one of those ports justified us putting on another vessel to handle it, we would have the right to do it, of course. Foss has the right to continue on in the general type of business which he was doing, and if the business demands of Puget Sound are such that he needs to buy ten more scows and some more towing boats, he of course has the right to do it, but he is staying in the field in which he was engaged, doing the kind of business that he was on the grandfather date, but he has not the
570 right to branch out into the car-ferry business.

Commr. SPLAWN. Can he take any different kind of packages than what he has been using before?

Mr. ROCKWOOD. Well, he can take a bigger package if he can handle it, of course.

Commr. SPLAWN. Can't take it in a freight car?

Mr. ROCKWOOD. How?

Commr. SPLAWN. He can't take it in a freight car?

Mr. ROCKWOOD. No; I do not believe so, because that requires special service.

Commr. SPLAWN. The point is that freight car ferry service is a distinct type?

Mr. ROCKWOOD. That is what Captain Foss thought.

Commr. SPLAWN. Yes; and did not give you notice?

Mr. ROCKWOOD. That is right. And I want to read some of that testimony of Captain Foss. It is quoted in the brief which we filed on February 23, 1944. He was testifying as a witness in the Marine case which, as I say, the records were consolidated. There he was seeking car-ferry rights for Marine Oil Transportation Company and he was embarrassed a little bit because the Marine Oil Company was a wholly owned subsidiary of Foss, and he wanted to show that there was no competition between the

companies and that you might with propriety issue certificates to the two companies. He was asked:

"Q. Is the service rendered by the Marine Oil Trans-
571 portation Company in any manner competitive with the operations of the Foss Launch & Tug Company?

"A. No.

"Q. Are the customers ever the same?

"A. They might be, but they never have been.

"Q. They never have been the same?

"A. No.

"Q. And if they were the same, it would be for an entirely different type of business they would be asking service for; is that correct?

"A. That is correct.

"Q. Do you know of any other tow-boat concerns in this area than the competitors you mentioned, the Drummond Lighterage Company and the Puget Sound Navigation Company, who offer service that could be considered in any way competitive with the business done by the Marine Oil Transportation Co.?"

After a little colloquy, he says: "No."

Mr. NcNealy, who was the secretary of the Northwest Towboat Association, of which there are many members, and which the Foss Company is a member of, of which the Puget Sound Navigation Company is not a member, was asked:

"Q. What would you say, Mr. McNealy, as to whether there is any actual competition between the Marine Oil Transportation Company and the other towboat concerns in this area
572 who are operating without any joint concurrences with rail carriers?

"A. There is none.

"Q. Why is that true?

"A. Because of the nature of the business that they handle.

"Q. Are the two businesses entirely dissimilar?

"A. Yes.

"Q. Do they handle the same type of commodity?

"A. They handle the same commodities, but not the same way. The ordinary tugboat company is not interested in that.

"Q. Does the ordinary tugboat company handle any through business with the rail carriers?

"A. None at all."

Mr. WETTRICK. Mr. Rockwood, would you mind reading to the Commission also the two paragraphs immediately following the answer that you said Mr. Foss gave?

Mr. ROCKWOOD. Oh, no. He was talking now as a witness for Marine Oil Company, which previously had rendered car service on Puget Sound, but which on the grandfather date, so the Com-

mission found, was not rendering that service. I read to you the testimony of Captain Foss where he said that the businesses were entirely dissimilar and that there was no competition between any companies other than Puget Sound Navigation Company and Drummond, the answer is "No."

573 "One reason we have done very little business lately is that the Puget Sound Navigation Company and the Drummond Lighterage Company have been in that business before we were in that business, and naturally, they would and should get most of the business when there is very little to distribute.

"When there is a surplus, then we come into the picture very strongly. During the past four or five years there has been so little car-barge business—there has been very little of it, and the other people have been able to take care of the business."

In other words, Drummond and Puget Sound took care of the business until it grew to the extent which it has now.

This is a good time for me to make this remark, we are speaking here only of the extent of the rights of the Foss Launch & Tug Company under the grandfather clause. We do not assert, and indeed we could not assert, that it may not acquire rights on a showing of convenience and necessity. Indeed, it has filed application for a certificate of public convenience and necessity which is pending on the docket of this Commission now and will be heard presumably this fall. In that application so far as Puget Sound Navigation Company is concerned, they sought rights to operate, as I recall, only from Seattle to Keyport and Ostrich Bay, not including Bremerton, because as a matter of fact Puget

574 Sound Navigation Company owns the crib facilities at Bremerton, and they can't get through that port, but only yesterday I received from my office copy of Mr. Wettrick's amendment to that application as originally made for Foss, and he has applied for a certificate of convenience and necessity for the Foss Company to render car-ferry service anywhere in Puget Sound. He has now blanketed the Sound. That case will be heard presumably by examiner early in the fall and on its merits will be decided. We are not talking about the question of whether it should have a certificate of public convenience and necessity on a proper showing. We are only talking and I am only talking as to the right which it had under the grandfather clause of Part III of the Act, and incidentally I think it is very interesting that Foss had no interest in the car-ferry service up until very recently. Foss now sees a volume of traffic moving to Bremerton and other areas because of war conditions, and would like some of it; not getting it, but he would like some of it. Whether or not the service is being handled adequately today so that there

is need for another carrier, that will be decided in the hearing on Foss' application for a certificate of public convenience and necessity, but it is not before the Commission yet; that is, it is not ready for submission.

Mr. WETTRICK. I think the records show that those applications were filed without waiving any of the legal rights that we may have in this matter here.

Mr. ROCKWOOD. I have cited in the brief which I filed in
575 February various decisions of the Commission under Part III of the Act and under Part II of the Act, illustrating, and simply for the purpose of illustration, the general policy of the Commission in restricting or imposing limitations on certificates issued under the grandfather clause. That is, they have placed restrictions as to the type of equipment which could be used, they have restricted, of course, as to the ports to which operations can be carried on, they have restricted as to the commodities which may be handled, all applying the general rule that the certificate must be restricted and define the business as it was carried on on the grandfather date, and those cases are all in line and in accord with the decisions of the Commission under Part II of the Act.

There is one line of cases under Part II that I think is interesting. The Commission has held in various cases that a carrier which has a general commodity certificate over a given route and which in fact has been carrying petroleum products in packages, drums, and so forth, may not on the basis of that certificate engage in the transportation of bulk petroleum. Now I know the Commission has classified bulk liquid products carriers in one group, and the same principle applies here, even though Foss Launch & Tug Company handled on the grandfather date in scow-loads in bulk some of the commodities which are now being trans-
ported across the Sound and which before that were trans-
576 ported across the Sound in freight cars, does not mean that it can engage in the transportation of commodities of that type if to do so requires acquisition and use of an entirely different type of equipment than that which it was using on the grandfather date. I think those decisions are in point.

I will conclude, and I will not use all of my time. The Foss Company never expected to get rights of this kind when it made its application, did not ask for them, did not want them. As stated by Captain Foss here, they were not in the car-ferry business because other carriers were handling it adequately; they did not expect to get it, they didn't want it. Now Foss comes and tries because of the continuity of the language in the original certificate, tries to embark in a new field and do something which it had never done before and which it had never expected to do.

at any time, and I believe that the Commission has the authority to correct its certificate and I believe that the Commission acted properly in correcting the certificate in the decision of September 18, 1943. I thank you very much.

Chairman PATTERSON. This case is submitted——

Mr. MCCOLLISTER. Your Honor please, you have been very generous, but I think I could perhaps save a little confusion if I could have perhaps five minutes to answer some of the arguments that have been made on the other side.

577 Chairman PATTERSON. No objection?

Reply argument of Parker McCollister, in behalf of Seatrain Lines, Inc.

Mr. MCCOLLISTER. First, may it please the Commission, I should have said in my original argument that I received a letter from Myron Bull asking me to tell you that he regretted that personal considerations prevented him from attending the argument here; he has filed a brief, and he asked me to tell you that he wanted to be recorded as supporting the position for which I have argued here. Mr. Bull is with the Bull Steamship Company, as your Honors know.

First, I want to clear the atmosphere a little bit so far as the relation between our case and the Foss case is concerned, and between the two sides of our own case, because I want your Honors to be sure that you bear in mind that in our case there are two applications and the considerations which may be involved in the determination of those two applications, if they were before you initially, would be different considerations.

The first is the application for grandfather rights where the question is only the fact as to the operations and the services in which we were engaged. The Texas operation is not a grandfather clause case or application under it. There the question is whether public convenience and necessity require the services for which a certificate was sought. I submit that as to both

578 of them we are entitled to rely upon the certificate as issued.

Certainly as to the Texas application involving future operations, that is even more proper than the New Orleans application and those cases involving franchises for new operations, and I submit that we are entitled to rely upon your Honors' finding there, that the future public convenience and necessity requires seatrain service in the terms in which you saw fit to describe it in that application, and that you cannot now because you may have wished that you had limited the rights when you granted them, you may not now change the terms of the certificate to accomplish retroactively an alteration of the rights that will

revoke some of the rights that we have under the certificate as issued.

Mr. Eshelman in his argument referred to the fact that in the Se'train cases, or several of them, it had been shown and the Commission had found that Seatrain's ships were engaged primarily in the handling of freight in cars. Of course, and that is what I told your Honors myself, and that is correct. The emphasis on the word "primarily," however, was intended to indicate that we did handle freight other than in cars. Mr. Eshelman said that we had to operate between fixed terminals. If your Honors will go to the record to which I made reference showing the Seatrain movement, you will find that the original design for seatrain ships called for the elevating machinery or tackle to handle cargo from ship to shore to be installed on the ship rather
579 than on shore, so that the ships could be operated otherwise than between fixed terminals, and whether the cargo handling machinery could be on the ship or on the shore is a matter of operating convenience. There are some cargo vessels of the break-bulk type that rely on shore tackles and there are others that rely on ship tackle.

Furthermore, because of the war situation, I cannot tell you all of the story; nor do I know it; nevertheless I think the Commission should be informed and may properly be informed, that some of Seatrain's ships are now engaged in ferrying cargo not in railroad cars, and are engaged in carrying freight not between fixed terminals.

Commr. PORTER. Well, but what the carrier is using those cars for is none of our business nor does it throw any light whatsoever on what we have here.

Mr. MCCOLLISTER. That is what the ships were designed for, Mr. Commissioner, and they are the ships that are to be used, that Seatrain in reliance upon the certificate has contracted to buy back from the Government. Now we did not have to buy those ships back; the Government requisitioned title.

Commr. PORTER. I can't see, frankly, myself, that the character of the way the Government is using those ships or what changes they have made in them has a thing to do with your certificates or any proposed alteration of them.

Mr. MCCOLLISTER. Mr. Commissioner, if those ships——

Commr. PORTER. How does it have anything to do with
580 this case?

Mr. MCCOLLISTER. Mr. Commissioner, if we cannot use those ships in their present state, in the state in which we have contracted to buy them back, if we cannot use them for the

handling of freight not in cars, then we have been deceived by your Honors' certificate because that certificate entitles us to use those ships for the handling of freight otherwise than in cars, and we have bought them on that basis. I submit, your Honors, that you have no authority therefore to revoke.

Commr. PORTER. Of course, there is nothing in this record as to any of the facts you are now stating.

Mr. MCCOLLISTER. There is Mr. Brush's affidavit, your Honors.

Commr. PORTER. I know the affidavit.

Mr. MCCOLLISTER. That is as far as under the circumstances we felt we could go.

There is in the record, your Honors, the whole story of the design of the ships and that in their design it was a matter of operating judgment as to whether the tackle should be put right on the ship or on the shore.

Now with respect to imposing any limit, your right to impose a limitation upon the type of vessel and the method of handling cargo, I think it is fortunate that the Foss case and the Seatrain case are here before you at the same time. In the Foss case
581 the question is whether the certificate issued should now be so limited as to prevent the handling of freight in cars, and in the Seatrain case the question is whether the certificate issued should be so modified now as to prevent the handling of freight in any other way than in cars.

On Mr. Eshelman's and Mr. Rockwood's theory, if you should uphold that, I submit that it would be necessary for your Honors to reopen—if you reopen, if you have the power, and I am sure they would deny it, reopen the certificates issued to Clyde Mallory, Pan-Atlantic, Eastern Steamship, Bull Steamship, Ocean Steamship, Southern Steamship, Morgan Line, and limit those certificates so that they would not authorize the handling of freight in cars, would not authorize them——

Commr. PORTER. Well, that argument you are now making is based on the assumption that under their certificate they can do that.

Mr. MCCOLLISTER. That is right.

Commr. PORTER. Which is different than the position that Division 4 has assumed.

Mr. MCCOLLISTER. I think they can, and in the Foss case Foss is contending that under the certificate authorizing it to transport freight, commodities generally, it can ferry freight in cars. That is the same language that is in the Clyde Mallory decision, and I think if the Foss case is right, if Mr. Wettrick's contentions are correct and your Honors are wrong in the Foss case, then
582 Clyde Mallory does have the right to handle freight in cars; but to be consistent, if when you use the language "engage

in transportation in the carriage of commodities generally," you do not mean that that transportation can be performed by any type of ship, by any type of container, then you have got to reopen every water carrier case and specify the type of ship and the type of container, and you will be treating us unfairly unless you do so.

Commr. PORTER. Then if you are right about that, we have got to reopen those cases where a man had a sailing vessel, that we limit his right to sailing vessels, we have got to reopen those?

Mr. MCCOLLISTER. I am not arguing that case, but I think you were wrong there, because I do not think that the Commission——

Commr. PORTER. I am glad to know that we were wrong so generally.

Mr. MCCOLLISTER. I do not think that the Commission can specify the motive power. Now, you have got to go further; this war is going to bring about changes in the art of water transportation, and if these water carriers are authorized to engage only in the kind of operations, meaning by that using the same type of ships and the same method of handling that they were employing before the war, then you have got to limit all of the certificates to prevent the handling by water carriers of cargo in trucks,
583 and there will be loads on trailers as distinguished from trucks with their own motive power, and in containers which may be loaded on railroad flat cars, and there will be freight loaded through side ports, as I said before. Now, I think that that is all wrong. I do not think that your Honors have the power and I think you would be embarking upon a very dangerous course if you should limit, or if you should attempt to assert that power, because I do not think that any regulatory body is wise enough to know what improvements will be made in the inventive art.

Commr. PORTER. Aren't you overlooking the fact that everybody in this world for that matter has a right to come here and ask for a certificate, and merely because under the grandfather statute or some other statute we issue a certain certificate does not forever preclude that party from coming back under the statute, does it?

Mr. MCCOLLISTER. No, Mr. Commissioner; but if I were interested in buying an invention I would be very loath to invest my money if before that invention could be put to use I had to come to some governmental agency and have that governmental agency say whether or not I could use that appliance in improving whatever I was trying to do, whether it be manufacturing, or carriage, or what-not.

Commr. ROGERS. Well, there would not be anything novel about that, your having to do that, would there?

Chairman PATTERSON. We have to do that now.

584 Commr. ROGERS. Any safety appliance, you cannot use that until you come to this Commission.

Mr. MCCOLLISTER. Mr. Commissioner, let me say this in conclusion: you have never held so far as I know that when the railroad wanted to put on container cars in order to more efficiently operate, when they wanted to use multiunit trains, or multiunit engines, instead of individual locomotives, that they had to come to you to let them do it.

Commr. ROGERS. The only point I want to make, you talk of the inventor, and the right to go ahead without running the risk of having it determined when you come up before another body.

Mr. MCCOLLISTER. I do not follow you there. It may be that you are right, but your Honors, I just submit that the law does not give you the power, and if you attempt to use it you are discriminating against the water carriers. Thank you very much.

Chairman PATTERSON. The cases are submitted and taken under advisement, and the Commission adjourns.

(At 3:10 p. m. the instant hearings were concluded.)

585 In the Supreme Court of the United States

Statement of points to be relied upon and designation of parts of the record to be printed

Filed March 28 1946

Come now the appellants and say that they will rely in brief and oral argument before this Court on the points made in their assignment of errors on their appeal in the above-entitled cause.

Appellants further designate the entire record in this cause as filed in this Court for printing by the Clerk, excepting that portion of Plaintiff's Exhibit 2 in the lower court consisting of tariffs and schedules numbered 1 to 51, inclusive, which need not be printed. Said tariffs may be considered a part of the record, although unprinted, for use in oral argument and briefs by all counsel the same as if printed.

J. Howard McGrath,
J. HOWARD MCGRATH,
Solicitor General,
For the United States of America.
DANIEL W. KNOWLTON,
E. M. REIDY,
For the Interstate Commerce Commission.

586 Service of a copy of the foregoing statement of points to be relied upon and designation of parts of the record to be printed acknowledged this 27 day of March 1946.

WILBUR LAROE, JR.,
Counsel for Seatrain Lines, Inc.

590 Supreme Court of the United States

Order noting probable jurisdiction

April 22, 1946

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

Mr. Justice JACKSON took no part in the consideration or decision of this question.

[Endorsement on cover:] File No. 50662. D. C. U. S., Delaware. Term No. 61. The United States of America and Interstate Commerce Commission, Appellants *vs.* Seatrain Lines, Inc. Filed March 16, 1946. Term No. 61 O. T. 1946.

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No. 959 61

In the Supreme Court of the United States

OCTOBER TERM, 1945

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

vs.

SEATRAIN LINES, INC.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF DELAWARE

STATEMENT AS TO JURISDICTION

In the District Court of the United States for the District of Delaware

Civil Action No. 579

SEATRAIN LINES, INC., PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

and

INTERSTATE COMMERCE COMMISSION, INTERVENING DEFENDANT

JURISDICTIONAL STATEMENT BY DEFENDANTS UNDER RULE 12 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES

(Filed February 27, 1946)

The defendants-appellants respectfully present the following statement disclosing the basis upon which it is contended that the Supreme Court of the United States has jurisdiction upon appeal to review the final judgment or decree in the above-entitled cause sought to be reviewed.

A. *Statutory provisions*

The statutory provisions believed to sustain the jurisdiction are:

U. S. C., Title 28, Section 47a (Act of March 3, 1911, c. 231, sec. 210, 36 Stat. 1150; as amended

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by Urgent Deficiencies Act of October 22, 1913; c. 32, 38 Stat. 220).

U. S. C., Title 28, Section 41 (28) (Act of June 18, 1910, c. 309, 36 Stat. 539; as amended March 3, 1911, c. 231, sec. 207, 36 Stat. 1148; October 22, 1913, c. 32, 38 Stat. 219).

U. S. C. Title 28, Section 44 (Act of October 22, 1913, c. 32, 38 Stat. 220; as amended by Act of February 13, 1925, c. 229, sec. 1, 43 Stat. 938).

U. S. C., Title 28, Section 47 (Act of October 22, 1913, c. 32, 38 Stat. 220).

U. S. C., Title 28, Section 345 (Act of March 3, 1891, c. 517, sec. 5, 26 Stat. 827; as amended January 20, 1897, c. 68, 29 Stat. 492; April 12, 1900, c. 191, sec. 35, 31 Stat. 85; April 30, 1900, c. 339, sec. 86, 31 Stat. 158; March 3, 1909, c. 269, sec. 1, 35 Stat. 838; March 3, 1911, c. 231, secs. 238, 244, 36 Stat. 1157; January 28, 1915, c. 22, sec. 2, 38 Stat. 804, February 13, 1925, c. 229, sec. 1, 43 Stat. 938).

B. *The statute of a state, or the statutes or treaty of the United States, the validity of which is involved*

The validity of a statute of a state, or of a statute or treaty of the United States, is not involved, except that the lower court held that there was nothing in a statute of the United States, namely, the Interstate Commerce Act, empowering the entire Interstate Commerce Commission to modify the terms and conditions of a certificate

previously granted by its Division 4, to Seatrain Lines, Inc., a common carrier by water.

C. *Date of the judgment or decree sought to be reviewed and the date upon which the application for appeal was presented*

The decree sought to be reviewed was entered on February 7, 1946. The petition for appeal was presented and allowed on February 27, 1946, together with the assignment of errors.

D. *Nature of case and of rulings below*

This is an appeal from a final decree of the United States District Court for the District of Delaware, entered February 7, 1946, setting aside a certificate of the Interstate Commerce Commission, dated February 6, 1945, in Docket No. W-543, *Seatrain Lines, Inc., Common Carrier Application,* 260 I. C. C. 430, wherein the Commission modified findings in a prior report of its division 4, dated July 2, 1942. The entire Commission found that Seatrain Lines was entitled to continue operation as a common carrier by water, in interstate or foreign commerce, by self-propelled vessels, in the transportation of liquid cargoes in bulk; of empty railroad cars, and of property loaded in railroad cars received from and delivered to rail carriers and transported without transfer, between the ports of New York, N. Y., New Orleans, La., and Texas City, Texas, by way of the Atlantic Ocean and the Gulf of

Mexico. The essential difference between the Commission and Division 4 was that the former confined Seatrain's operations to the kind of operations it was engaged in at the time of the "grandfather" clause of the Water Carrier Act, January 1, 1940, namely the peculiar "Seatrain" type of operation, whereas under the Division's certificate Seatrain could handle commodities generally, in bulk or otherwise, like the ordinary "break-bulk" type of vessel.

By applications filed on May 29, 1941, Seatrain sought a certificate of public convenience and necessity under the "grandfather" clause of Part III of the Interstate Commerce Act, section 309 (a), authorizing continuance of operation as a common carrier by water, in interstate or foreign commerce, in the transportation of commodities generally and passengers between New York and New Orleans, La., via the Atlantic Ocean and the Gulf of Mexico; and it also sought a certificate under section 309 (a) and (c) authorizing continuance of an operation (termed an "interim" operation) instituted between January 1, 1940 (the critical date under the "grandfather" clause) and February 1, 1941 (the date section 309 took effect), as a common carrier by water, in interstate or foreign commerce in the transportation of commodities generally between New York and Texas City, Texas, by way of the Atlantic Ocean and the Gulf of Mexico. The two applications

were consolidated for action, and disposed of in one report.

In its application under the "grandfather" clause, Seatrain described its operation as a "regular weekly service (inaugurated in 1932) in each direction between the Port of New York and the Port of New Orleans, via Havana, Cuba, or direct"; it also advised that Seatrain has continued "to operate as above stated." Attached to the application was an affidavit of its official, E. K. Morse, dated May 28, 1941, in which he asked the Commission to refer to its findings in prior cases involving Seatrain. Seatrain's operations have been a rather prolific source of litigation before the Commission and in the courts[1] and the Com-

[1] *Investigation of Seatrain Lines*, Docket No. 25565, with which was also heard a proceeding on the *Application of the Missouri Pacific Railroad Company and Texas and Pacific Railway Company under Paragraphs 9, 10 and 11 of Section 5 of the Interstate Commerce Act*, Docket No. 25546. The Commission made and published two reports, 195 I. C. C. 215 (1933); 206 I. C. C. 328 (1935).

Seatrain Lines, Inc. v. *The Akron, Canton & Youngstown Railway Company et al.*, Docket No. 25727, in which and in a related case, I. & S. Docket No. 4542, the Commission made three reports, 226 I. C. C. 7 (1938); 243 I. C. C. 199 (1940); 259 I. C. C. 297 (1944).

Hoboken Manufacturers Railroad Company v. *The Akron, Canton & Youngstown Railway Company et al.*, Docket No. 27630. The Commission's report in this proceeding is published in 234 I. C. C. 114 (1939).

Hoboken Manufacturers Railroad Company v. *Abilene & Southern Railway Company et al.*, Docket No. 25728. The Commission made four reports, 206 I. C. C. 328 (1935);

mission was quite familiar with the unique character of Seatrain.

Seatrain's application as an "interim" operator between New York and Texas City, Texas, contained substantially the same information, except that its revenue condition was discussed more fully.

An examiner of the Commission conducted a field examination concerning Seatrain's operations and recommended that its "interim" application be granted.

Without further proceedings, Division 4 of the Commission, consisting of three members, issued its report wherein the Division found:

> We find that Seatrain Lines, Inc., was in bona fide operation on January 1, 1940, as a common carrier by self-propelled vessels, in interstate or foreign commerce, in the transportation of commodities generally between the ports of New York and New Orleans, by way of the Atlantic Ocean and the Gulf of Mexico; and that such operation has been continued since that date, except for an interruption of service over which applicant had no control.
>
> We further find that the present and future public convenience and necessity re-

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226 I. C. C. 7 (1938); 237 I. C. C. 97 (1940); 248 I. C. C. 109 (1941).

See also *Int. Com. Comm.* v. *Hoboken Mfrs. R. R. Co.*, 320 U. S. 368; *United States* v. *Penna. R. R. Co. et al.*, 323 U. S. 612.

quire operation by applicant as a common carrier by self-propelled vessels, in interstate or foreign commerce, in the transportation of commodities generally between the ports of New York and Texas City, by way of the same route; and that applicant is fit, willing, and able to continue the operation.

We further find that applicant is entitled to a certificate authorizing such operations, subject, however, to general conditions which are necessary to carry out, with respect to continuance of applicant's operations, the requirements of part III of the act and the orders, rules, and regulations of the Commission thereunder. For the reasons given above, that portion of the application seeking authority to transport passengers between New York and New Orleans will be denied.

A certificate was issued, to become effective on August 10, 1942.

About 18 months later, on December 18, 1943, the Commission on its own motion, reopened the case for reconsideration, and by another order, dated January 27, 1944, it was provided:

It is ordered, That the said proceeding be, and it is hereby reopened for hearing upon the question of whether or not the said findings and certificate and order of July 2, 1942, should be modified so as to authorize applicant to continue to operate in service in which it was engaged, except for interruptions beyond its control,

namely, as a common carrier by the "Seatrain" type of vessels in the transportation of liquid cargoes in bulk; of empty railroad cars, and of property loaded in freight cars received from and delivered to rail carriers and transported without transfer from the freight cars between the ports above mentioned.

And it is further ordered, That this proceeding be, and it is hereby assigned for hearing at the offices of the Commission in Washington, D. C., at 9:30 A. M. on February 28, 1944, before Examiner Porter and Examiner Copenhafer.

A motion for vacation and rescission of the reopening order was filed by Seatrain on March 24, 1944, and renewed at a hearing held March 27, 1944. At that hearing Mr. McCollester, counsel for Seatrain, stated:

> I am directed by my client to inform the Commission that until our motion is passed upon, and if the Commission wishes argument on it we are, of course, prepared to argue it more fully; but until our motion is acted upon, we are not prepared to go forward with any evidence.
>
> Commr. PORTER. Well, I will overrule the motion. Of course, you know without my advising you at all, you have of course a perfect right of appeal to the entire Commission, but at the same time I will overrule the motion.

The motion for vacation of the reopening order was presented to the entire Commission and de-

nied on April 3, 1944, "without prejudice to its renewal at the conclusion of the hearing to be held pursuant to said order of reopening," and, following the filing of petitions for intervention, which were granted, by the Ocean Steamship Company of Savannah, Agwilines, Inc., Eastern Steamship Company and the Bull Steamship Lines, the matter came on for further hearing before Commissioner Porter on April 24, 1944.

At this rehearing, Mr. McCollester said:

> Mr. McCollester. Mr. Commissioner, we have no evidence to offer. Our application was filed, the supporting data was presented in support of the two applications.
>
> The certificates have been issued and have been in effect for a year and half or more, and therefore, we do not conceive that there is any question of fact that can now be before the Commission in regard to them, and, consequently, we have no evidence.

After this declination to produce evidence Commissioner Porter referred in some detail to the record the Commission would have before it in determining the issues. Whereupon counsel for applicants stated:

> Mr. McCollester. I thank Your Honor for bringing those matters to our attention. If I correctly understand, all of the material to which Your Honor has referred, is material which was presented in con-

nection with the applications considered by the Commission in issuing its order of July 2, 1942, which contains certificate and was the material upon which that certificate was based.

If that clearly appears, of course, we, ourselves, would want that. We want to have that clearly understood. The only objection we would have to the consideration by the Commission at this time, or the receipt for purposes of consideration of any evidence or material of any sort in the nature of factual information which was not before the Commission and was not considered by it in issuing the certificate.

Commr. PORTER. Well, Counsel understands of course that the reports of the Commission to which I have referred and identified in the record here, were all matters of our records and were before us at the time, and were available to us at the time we issued the certificates.

Mr. MCCOLLESTER. That is right.

The entire Commission on May 8, 1944, by order, affirmed its earlier action overruling Seatrain's application to dismiss the proceedings for lack of jurisdiction in the Commission to proceed. The case was fully argued before the entire Commission on July 21, 1944, and counsel for applicant stated his position as follows:

Commr. PORTER. Well, your point briefly is that this Commission when it once issues a certificate that that ends it and that it

loses its power to change, alter, or modify it in any respect whatsoever? Isn't that your motion?

Mr. McCollester. Yes, Mr. Commissioner, if there is no fraud or misrepresentation and if there is full disclosure of the facts and if action has been taken by the applicant in reliance upon the rights granted.

* * * * *

I would say this, that the certificates which have been issued, if there was no fraud or misrepresentation or failure of full disclosure in the applications for the certificates, if they have become effective you cannot now revoke any of the rights, and they are entitled to all of the rights which would accrue under the language of the certificate.

Commr. Porter. Forever and a day.

Mr. McCollester. Forever and a day, so long as they do not abandon. If they abandon that is another matter. It seems to be pretty well established by the decisions of the court that in the event of abandonment a certificate may be cancelled.

On February 6, 1945, the Commission decided the case, three Commissioners dissenting (one as a matter of policy rather than lack of legal authority in the Commission to do what it did) and one Commissioner not participating. This report (260 I. C. C. 430) is attached to the petition as plaintiff's Exhibit B.

In this report the Commission pointed out that the purpose of the "grandfather clause" of Part III was to assure to applicants a "substantial parity" between future operations and prior *bona fide* operations; that under this clause Seatrain was

> engaged on January 1, 1940, and continuously since, except for interruptions beyond its control, in the transportation by water, by self-propelled vessels, in interstate or foreign commerce, of liquid cargoes in bulk; of empty railroad cars, and of property loaded in railroad cars received from and delivered to rail carriers and transported without transfer from railroad cars, between the ports of New York and New Orleans by way of the Atlantic Ocean and the Gulf of Mexico.

With respect to its "public convenience and necessity" application covering operations between New York and Texas City, the Commission found:

> Applicant is fit, willing, and able to continue operations instituted after January 1, 1940, between New York and Texas City, in the transportation by water, by self-propelled vessels, in interstate or foreign commerce, of liquid cargoes in bulk; of empty railroad cars, and of property loaded in railroad cars received from and delivered to rail carriers and transported without transfer from railroad cars, which

operations are required by public convenience and necessity.

The report of the Commission contains a full discussion as to its authority to modify or correct a certificate inadvertently conferring greater rights than subsequently found an applicant should receive. It pointed out that when Division 4 authorized the issuance of a certificate on July 2, 1942, that the certificate provided that it was subject "to such terms, conditions, and limitations as are now, or may hereafter be, attached to the exercise of such authority by this Commission." It cited section 309 (d) of Part III of the Act, which provides:

> Such certificate shall specify the route or routes over which, or the ports to and from which, such carrier is authorized to operate, and, at the time of issuance and from time to time thereafter, there shall be attached to the exercise of the privileges granted by such certificate such reasonable terms, conditions, and limitations, as the public convenience and necessity may from time to time require, including terms, conditions, and limitations as to the extension of the route or routes of the carrier, and such other terms, and conditions, and limitations as are necessary to carry out, with respect to the operations of the carrier, the requirements of this part of those established by the Commission pursuant thereto: *Provided, however,* That no terms, conditions, or limitations shall re-

> strict the right of the carrier to add to its equipment, facilities, or service within the scope of such certificate, as the development of the business and the demands of the public shall require, or the right of the carrier to extend its services over uncompleted portions of waterway projects now or hereafter authorized by Congress, over the completed portions of which it already operates, as soon as such uncompleted portions are open for navigation.

It relied too on section 315 of Part III, which provides in part as follows:

> (c) The Commission may suspend, modify, or set aside its orders under this part upon such notice and in such manner as it shall deem proper.
>
> (d) Except as otherwise provided in this part, all orders of the Commission other than orders for the payment of money, shall take effect within such reasonable time, not less than thirty days, as the Commission may prescribe and shall continue in force until its further order, or for a specified period of time, according as shall be prescribed in the order, unless the same shall be suspended, modified, or set aside by the Commission, or be suspended or set aside by a court of competent jurisdiction.

Based on these provisions and after discussing various decisions of the Commission and this court, the Commission concluded it had the au-

thority to modify the prior certificate in order to confine Seatrain to what it was actually doing.

In answer to the claim that considerable commitments and expenditures had been made by applicant on the strength of the certificate issued by Division 4, the Commission reviewed these claims, and found that, despite the fact that the proceeding was set twice for hearing, the applicant failed to introduce any evidence; therefore it concluded "The record therefore contains no specific showing in that respect". On February 6, 1945, the issuance of a corrected certificate to conform to the new findings of the Commission was authorized. The order of the Commission thereunder has never become effective, having been voluntarily postponed by the Commission from time to time at the request of the court to afford it an opportunity to pass on the issues involved, and finally, on February 7, 1946, having been permanently enjoined by the court.

The petition to set aside the Commission's report of February 6, 1945, was filed in the District Court on May 12, 1945. Broadly speaking, the petition alleged that the Commission had no authority to change the certificate once it had been issued; that the authority conferred by section 315 (c) to impose terms and conditions after the issuance of the certificate did not authorize the Commission to change a certificate in the material manner it sought to do here, and that to hold otherwise would deprive plaintiff of its

property without due process of law in violation of the Fifth Amendment. No specifications concerning the allegation of confiscation were set out except in the most general of terms. (Paragraph 50 of petition.) The case was orally argued before the three-judge court on July 20, 1945, and at that hearing, over the objections of defendants, plaintiff was permitted to introduce evidence *de novo* in court in support of its claim that it had made large expenditures of money on the strength of the original certificate, evidence which it had not sought to present to the Commision, although afforded two opportunities to do so. On January 30, 1946, the District Court rendered its decision sustaining plaintiff's contentions and permitting the new evidence to be presented to it. On the strength of this evidence, which had not been presented to the Commission, the court found that expenditures had in fact been made. Also, the court held that the Commission had no authority to alter the terms of a certificate once issued. Findings of fact and conclusions of law were entered by the court on the same day, and a final decree was entered on February 7, 1946.

The questions presented by this appeal are substantial. The important question concerns the authority of the Commission to change a water carrier certificate inadvertently issued by a Division or whether such a certificate is good, as applicant contended to the Commission, in the absence of misrepresentation, fraud, etc., "forever

and a day". Also presented is the question whether a party can decline to present evidence to the Commission, and then, on the most general of confiscation charges, be permitted to introduce evidence *de novo* in court, and largely on the strength of that new evidence, succeed in annulling an order of the Commission. The Commission indicated in its report of February 6, 1945, that the authority it asserted here would be "sparingly exercised" (260 I. C. C. at p. 441). If plaintiff had in fact presented to the Commission evidence as to large expenditures on the strength of the original certificate, evidence which it twice declined to present to the Commission at formal hearings called for that purpose among others, such evidence might have changed the conclusion of the Commission to modify the certificate, in view of its statement (260 I. C. C. at p. 441) that it would avoid adversely affecting vested interests. No supported showing of vested interests had been presented to it. The Water Carrier Act, Part III of the Interstate Commerce Act, was approved on September 18, 1940, and due largely to the war, many vessels, including Seatrain's, had been devoted to war purposes rather than commercial handling of freight. With the cessation of hostilities, the principal question in this case has attained further importance. It is essential that in the early days of regulation of water carriers the Commission

be advised by a determination of the Supreme Court just what authority Congress has conferred upon it to modify a water carrier certificate. Also, we submit that the District Court interfered with the administrative process by permitting plaintiff to test an order of the Commission in court on a different record from that on which the order was made.

E. *Cases sustaining the Supreme Court's jurisdiction of the appeal*

United States v. *Chicago, Milwaukee, St. Paul & Pacific R. R. Co.*, 294 U. S. 499;

United States v. *Baltimore & Ohio Railroad Company*, 293 U. S. 454;

Florida v. *United States*, 282 U. S. 194;

Beaumont, Sour Lake & Western Railway Company v. *United States*, 282 U. S. 74;

Ann Arbor Railroad Company v. *United States*, 281 U. S. 658;

Louisville & Nashville R. R. Co. v. *United States*, 238 U. S. 1;

Interstate Commerce Commission v. *Union Pacific Ry. Co.*, 222 U. S. 541;

United States v. *Pennsylvania R. R. Co.*, 323 U. S. 612;

Acker v. *United States*, 298 U. S. 426;

Tagg Bros. & Moorhead v. *United States*, 280 U. S. 420;

Interstate Commerce Commission v. *Union Pacific Ry. Co.*, 222 U. S. 541;

New England Divisions Case, 261 U. S. 184;
Alton R. Co. v. *United States,* 287 U. S. 229;
United States v. *Lowden,* 308 U. S. 225;
Hudson & Manhattan R. Co. v. *United States,* 313 U. S. 98; and
Interstate Commerce Commission v. *Hoboken Manufacturers' Railroad Co.,* 320 U. S. 368.

F. *Opinion and Decree of the District Court*

Appended to this statement are: (1) copies of the opinion, findings of fact and conclusions of law of the District Court dated January 30, 1946, and (2) copies of the final decree of said court sought to be reviewed, dated February 7, 1946.

We, therefore, respectfully submit that the Supreme Court of the United States has jurisdiction of the appeal.

Dated February 27, 1946.

F. HOWARD MCGRATH,
Solicitor General,
J. J. MORRIS, JR.,
United States Attorney,
WENDELL BERGE,
Assistant Attorney General,
EDWARD DUMBAULD,
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For the United States of America.
DANIEL W. KNOWLTON,
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Assistant Chief Counsel,
For the Interstate Commerce Commission.

In the District Court of the United States for the District of Delaware

CIVIL ACTION No. 579

SEATRAIN LINES, INC., PLAINTIFF

vs.

UNITED STATES OF AMERICA, DEFENDANT

OPINION

Before BIGGS and MCLAUGHLIN, Circuit Judges, and LEAHY, District Judge.

By BIGGS, *Circuit Judge*.

The suit at bar presents vexatious problems. The plaintiff is Seatrain Lines, Inc., whose operations have been the subject of discussion and decisions by the courts[2] and by the Interstate Commerce Commission[3] on numerous occasions. Reference is made to these decisions for general and particular descriptions of Seatrain's business. Since October 1932 Seatrain has operated as a common carrier in the transportation of

[2] See *United States* v. *Pennsylvania R. Co.*, 323 U. S. 612, 613, and *I. C. C.* v. *Hoboken R. Co.*, 320 U. S. 368, 371–372; *Pennsylvania R. Co.* v. *United States*, 55 F. Supp. 473, 476–477, and *Hoboken Mfrs. R. Co.* v. *United States*, 47 F. Supp. 779, 781.

[3] See investigation of *Seatrain Lines, Inc.*, 195 I. C. C. 215, 206 I. C. C. 328; *Seatrain Lines, Inc.* v. *Akron, C. & Y. Ry. Co.*, 226 I. C. C. 7, 243 I. C. C. 199; *Hoboken Mfrs. R. Co.* v. *Akron C. & Y. Ry. Co.*, 234 I. C. C. 114; *Hoboken Mfrs. R. Co.* v. *Abilene & S. Ry. Co.*, 237 I. C. C. 97, 248 I. C. C. 109; *Missouri Pac. R. Co. and T. & P. Ry. Co., Service by Water*, 245 I. C. C. 143.

property by water. Seatrain ships carry standard gauge railroad tracks and are so designed that loaded freight cars may be lifted to or from the vessels by a cradle device. Commodities may thus be transported in freight cars from shore to ship and from ship to shore without breaking bulk. The cost of loading and unloading freight at the ports is thus reduced substantially. Prior to the war Seatrain took delivery of freight cars from the trunk line railroads at the Port of New York and delivered the cars to trunk line railroads at Belle Chasse, the Port of New Orleans. Seatrain also delivered liquid cargoes in bulk and transported commodities generally. A comparatively small part of the commodities shipped originated at Seatrain's own terminals. Most of the commodities transported were carried in railroad cars put on board the vessels by the peculiar Seatrain devices.[1]

In May 1940, Seatrain inaugurated substantially similar service between the port of New York and Texas City, Texas.

On May 28, 1940, Seatrain filed two applications with the Interstate Commerce Commission for certificates of convenience and necessity as a common carrier of commodities generally between New York and New Orleans and New York and Texas City, respectively. The "grandfather date" appli-

[1] Seatrain also had accommodations for two passengers on each vessel. We are not presently concerned, however, with this service.

cable to water carriers is January 1, 1940. See Section 309 (a), Part III, Interstate Commerce Act, 49 U. S. C. A. § 909 (a). One of Seatrain's two applications to the Commission was for a certificate as a common carrier of commodities generally between New York and New Orleans under the "grandfather" clause. Its second application was for a certificate for its New York and Texas City service as a common carrier of commodities generally, without benefit of the grandfather clause, pursuant to Section 309 (a) and (c). Notice of these applications was given by the ICC to certain competing steamship lines, common carriers of commodities generally. On July 2, 1942 the ICC by Division 4 filed a decision [5] granting Seatrain a single certificate as a common carrier by self-propelled vessels of commodities generally between New York and New Orleans and between New York and Texas City. The certificate contained a clause in the usual form stating that the carrier was authorized to perform the service specified subject "* * * to such terms, conditions, and limitations as are now, or may hereafter be, attached to the exercise of such authority by this Commission." The Division laid emphasis in its opinion on the peculiar value of the Seatrain service in that shipments were made in carload lots without breaking bulk and loading and unloading the cars at the ports.

[5] Not reported for publication.

The certificate was ordered to take effect from and after August 10, 1942. Seatrain asserts and has proved, as will hereinafter appear, that acting upon the authority granted by the certificate it has made substantial expenditures and important commitments for the future.[6]

On December 18, 1943, however, Division 4 ordered reconsideration of Seatrain's applications and of the applications for certificates of the Foss Launch & Tug Co. See 260 I. C. C. 103. The division thereafter amended the certificate first issued to the Foss Company on August 26, 1942. The certificate originally issued by the Commission to the Foss Company authorized it to transport commodities generally. The amended certificate issued to the Foss Company eliminated the company's authority to "transport freight cars, loaded or empty, in the performance of a freight-car-ferry service." The course pursued by Division 4, and hence by the Commission, in respect to the Foss company had repercussions on the Sea-

[6] See the opinion of the Commission in the case at bar, 260 I. C. C. 430. Commissioner Porter stated in this opinion, p. 442 "Applicant asserts that pursuant to, and in reliance upon, the certificate it made plans to reenter the coastwise trade and has incurred substantial expense and made important commitments for the future. * * *" See also the testimony of Graham M. Brush, president of Seatrain, at the hearing before this court.

Seatrain's services were terminated by the war, its vessels being requisitioned by the United States. It has planned to recreate and extend its services as indicated.

train certificate. See also the decision of the Commission in Newtex S. S. Corporation Common Carrier Application, 260 I. C. C. 418. On February 6, 1945, having granted Seatrain an opportunity for the presentation of evidence of which Seatrain did not avail itself and after certain intermediate steps which need not be recited here, the full Commission, one member only being absent, over the protests of Seatrain in respect to the Commission's jurisdiction, ordered Seatrain's original certificate cancelled and a new certificate issued in lieu thereof.

The new certificate limited Seatrain to the service of "a common carrier by self-propelled vessels * * * in the transportation of liquid cargoes in bulk; of empty railroad cars; and of property loaded in freight cars received from and delivered to rail carriers and transported without transfer from railroad cars between the Ports" of New York and New Orleans on the one hand and New York and Texas City on the other. Mr. Brush, the president of Seatrain, testified before this court that the limitations placed upon Seatrain's service by this amendment to its certificate will substantially impair the business of Seatrain, will render useless the expenditures and commitments heretofore made by Seatrain and will result in serious losses to the company.

[7] Cf. the decision of the Commission in Newtex S. S. Corporation Common Carrier Application, 260 I. C. C. 418.

Seatrain has petitioned this court[8] to set aside the order of the Commission entered February 6, 1945 and the corrected certificate of public convenience and necessity embodied in that order.

The Commission was not unanimous in the views expressed in its opinion of February 6, 1945.[9] One Commissioner concurred in a separate opinion and three Commissioners dissented in separate opinions. The Commissioners who joined in the majority opinion and the concurring Commissioner took the position that in granting the original certificate to Seatrain authorizing it to transport commodities generally the Division had committed an inadvertent error or a mistake which should be corrected by the amended certificate. The dissenting Commissioners took the view that the action of Division 4 in granting the original certificate to Seatrain was not the result of inadvertence or a mistake but represented the studied policy of the Commission until the reopening of, and the issuance of the amended certificate in, the Foss case. One Commissioner was of the opinion that when a certificate of convenience and necessity has been issued to a common carrier by water that certificate is a franchise and may not be revoked.[10]

[8] Pursuant to the provisions of the Commerce Court Act and the Urgent Deficiencies Act as reenacted. See 28 U. S. C. A. § 41 (28) and §§ 43 to 48, inclusive.

[9] See 260 I. C. C. 430.

[10] No other member of the Commission took this view. All the other members rejected it either expressly or implicitly.

The principal issue which we must decide is the authority of the Commission to alter drastically its original certificate. The original certificate permitted the petitioner, as we have stated, to engage in the transportation of commodities generally as a common carrier by water. The amended certificate limiting transportation to property loaded in freight cars received from and delivered to rail carriers without transfer, in effect reduces Seatrain to the status of a car-ferry. It may not initiate or terminate traffic; it may not deliver freight to a truck or any receiver other than a railroad. Such a change in status scarcely can be considered to lie within the permissible rights reserved in the former certificate to change "terms, conditions and limitations * * * attached to the exercise" of the authority. This clause is based on the provisions of Section 309 (d) of the Act, 49 U. S. C. A. § 909 (d), but the "terms, conditions, and limitations" contemplated by Congress were of the kind that were before the Supreme Court in *Crescent Express Lines, Inc.* v. *United States*, 320 U. S. 401 and in *Noble* v. *United States*, 319 U. S. 88. The terms or conditions or limitations which may be imposed by the Commission under the authority of the section cited cannot sanction the radical step which the Commission has taken of transmuting a common carrier by water of commodities generally into a car-ferry.

There is no statutory authority for the revocation or alteration of a certificate. The Commission relies on Sections 17 (7) and 315 (c) of the Act, 49 U. S. C. A. §§ 17 (7) and 915 (c). The first subsection referred to is from Part I of the Act relating by reference to common carriers by water. That subsection makes determinations by the Commission subject to rehearing and reconsideration, and provides that the Commission or a division of the Commission may change or modify any decision, order or requirement made by a division. Subsection (c) of Section 315 provides that "The Commission may suspend, modify, or set aside its orders under this part upon such notice and in such manner as it shall deem proper." The provision last quoted is intended to apply to regulatory orders of the Commission and not to permit the cancellation of orders authorizing the issuance of certificates of public convenience and necessity. It is our opinion that these statutory provisions do not aid the standing of the Commission's order of February 6, 1945.

Section 212 (a), Part II of the Act, 49 U. S. C. A. § 312 (a), dealing with Motor Carriers, provides a method whereby a certificate issued to a motor carrier may be suspended or terminated by the Commission. We think it must be conceded that insofar as the termination or revocation of a certificate issued to a motor carrier under Part II

of the Act is concerned, the power of the Commission to terminate or revoke is created and defined in Section 212 (a); that if the Commission does not act under that section it is without power to terminate or revoke the certificate of a motor carrier. The Commission has so held. Smith Bros., Revocation of Certificate, 33 M. C. C. 465. Part III of the Act contains no similar provisions. The Commission itself prior to the enactment of the Transportation Act of 1940, 54 Stat. 898, called this very fact to the attention of Congress. Commissioner Eastman, Chairman of the Commission's Legislative Committee, reporting to the Senate Committee on Interstate and Foreign Commerce and the House Committee on Interstate and Foreign Commerce on S. 2009 on January 29, 1940, stated, "This bill leaves section 212 (a) unchanged and has no corresponding provision in the new part III. While there is room for argument we are inclined to believe that provision for the revocation or suspension of water carrier certificates is not essential if adequate penalty provisions are provided for violation of part III. Revocation or suspension, in the case of motor carriers, is believed to be the most effective means of enforcement since there are so many such carriers and the operations of the great majority are so small, that enforcement through penal actions

in courts presents many practical difficulties, but this is not true of water carriers." [11]

Congress did not include in Part III any express power to change, amend or revoke a certificate held by a carrier by water. We agree with Commissioner Lee that the conclusion seems inescapable that Congress did not intend to confer upon the Commission power to revoke a certificate of public convenience and necessity issued to a common carrier by water. Whether the certificate when issued be called a "franchise" or not seems relatively unimportant.[12] Whatever be its proper name, it is a creature of the statute. Under the particular circumstances presented here, once the certificate was given it may not be revoked, can-

[11] Letter from the Chairman of the Legislative Committee, Interstate Commerce Commission, transmitting to the Chairman of the Senate Interstate Commerce Committee and the Chairman of the Committee on Interstate and Foreign Commerce of the House of Representatives a report relative to omnibus transportation legislation, S. 2009, as passed by both houses of Congress, dated January 29, 1940; House Committee print, United States Government Printing Office, Washington, 1940.

The same document is cited in note 5 to the decision in *Ziffrin, Inc.* v. *United States*, 318 U. S. 73, 77.

[12] If the certificate be deemed a franchise, since it grants rights to engage in business of a public nature, the grant which it contains is protected by the Fifth Amendment to the Constitution. Unless the right be reserved, the grant may not subsequently be impaired. *Frost* v. *Corporation Commission*, 278 U. S. 515; *Owensboro* v. *Cumberland Telephone Co.*, 230 U. S. 58. The inviolability of the certificate is clear whether it be considered a purely statutory creation or to be of the nature of a franchise.

celled or limited in any substantial fashion. The statute confers no such power on the Commission and, as we have stated, the Commission's powers are purely statutory.[13]

It is clear that the Commission may not amend the certificate by changing its essential grant as in the case at bar. It is agreed that there was no fraud in the procurement of the certificate.[14] The Commission asserts, however, that the original grant was made through inadvertence and that it has the right to correct such errors. There is no authority for such remedial action. If the Commission may correct inadvertent errors its power to do so much be deemed to lie in the general authority conferred upon any quasi-judicial or administrative body. Assuming an analogy to the remedial powers of courts to be persuasive, after the end of the term at which the judgment was rendered a court could not reopen the record to correct other than clerical errors except by recourse under unusual circumstances to the ancient writ of *coram nobis*.[15] The mistake of the Commission made by its Division 4 was certainly not

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[13] *United States* v. *Pennsylvania R. Co.*, 242 U. S. 208; *Interstate Commerce Commission* v. *Cincinnati, N. O. & T. P. Ry. Co.*, 167 U. S. 479.

[14] Cf. *Hazel-Atlas Glass Co.* v. *Hartford Empire Co.*, 322 U. S. 238.

[15] Cf. *United States* v. *Steese*, 144 F. 2d 439. See Rule 60 (b) of the Federal Rules of Civil Procedure, 28 U. S. C. A. foll. § 723c permitting corrections of errors due to the litigant's inadvertence.

clerical and the common law writ is not available to the Commission. Even if it were there are no circumstances in the case at bar which would warrant its application by analogy.

Although the Commission terms the issuance of the original certificate as an instance of inadvertent error, it appears to have resulted from the considered judgment of Division 4 and, therefore, of the Commission. While the petitioner's references to the Foss and the Newtex cases are helpful perhaps in forming a basis to conjecture the Commission's trend of policy, it is unnecessary and indeed improper to attempt to ascertain the mental processes of the Commissioners at the time of the issuance of the original order and certificate. The Supreme Court in the recent case of *Mine Workers* v. *Eagle Picher Co.*, 325 U. S. 335 addressed itself to the problem of the correction by an administrative body of its own error. In the cited case the National Labor Relations Board had applied to the Circuit Court of Appeals for the Eighth Circuit for the enforcement of a back pay order and had stated incorrectly the method for computation of the back pay, resulting in a drastic curtailment of pay admittedly owed the employees. The Circuit Court had adopted the Board's method of computation and had approved it in its decree. The company was not prejudiced by this order. Nevertheless, the Supreme Court refused to permit the correction of the patent error. In discussing the question of inadvertence

Mr. Justice Roberts speaking for the Court cogently declared, *id.* p. 341, "Administrative flexibility and judicial certainty are not contradictory; there must be an end to disputes which arise between administrative bodies and those over whom they have jurisdiction. This does not mean that the Board could not frame an order which by its terms required modification should conditions change. But here the order was definite and complete; * * * The conditions remained the same; what changed was the Board's awareness of them." In the case at bar the Commission has not applied to the courts. However, we believe that the reasoning of the Supreme Court is applicable by analogy to final administrative orders including the order of the Commission granting the original certificate.

The testimony introduced by the petitioner showing its expenditure of funds and its large commitments in reliance upon the original certificate will not be stricken from the record. The petitioner has alleged that the Commission's order will deprive it "* * * of property and take its property for public use without just compensation and without due process of law in violation of the Fifth Amendment * * *". The evidence referred to is pertinent to the question, one of mixed

law and fact, raised by the petitioner. The testimony objected to supports the conclusion that the petitioner will be deprived of property without compensation and without due process of law if the order of the Commission shall become effective. See *B. & O. R. Co.* v. *United States,* 298 U. S. 349, 368–9, and *United States* v. *Idaho,* 298 U. S. 105, 108–9. See also Commissioner Porter's statement, note 5 *supra.*

The Commission has made the argument that the original certificate was too limited in that it did not give Seatrain the right to transport empty freight cars. Therefore, the second certificate, it reasons, is in reality broader than the first. We reject this contention. If the first certificate does not authorize Seatrain to transport empty freight cars, that question may be tested in so appropriate manner. The phraseology of th rtificate cannot serve, of course, to impair Seatrain's rights under the grandfather clause in respect to the New York-Belle Chasse route. *United States v. Maher,* 307 U. S. 148; *Quaker City Bus Co.,* 38 M. C. C. 603.

The order of the Commission will be set aside.

Findings of fact and conclusions of law are filed with this opinion.

(January 30, 1946.)

In the District Court of the United States for the District of Delaware

CIVIL ACTION No. 579

SEATRAIN LINES, INC., PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

FINDINGS OF FACT

1. The petitioner, Seatrain Lines, Inc., filed seasonably with the Commission two separate applications: (1) an application for a certificate covering petitioner's New York-New Orleans operation, based on "grandfather" rights; and (2) a separate application, based not on grandfather rights, but on a showing of public convenience and necessity, for Seatrain's proposed New York-Texas City operation.

2. Division 4 of the Commission consisting of three members, issued its report, dated July 2, 1942, wherein the Division found:

> We find that Seatrain Lines, Inc. was in bona fide operation on January 1, 1940, as a common carrier by self-propelled vessels, in interstate or foreign commerce, in the transportation of commodities generally between the ports of New York and New Orleans, by way of the Atlantic Ocean and the Gulf of Mexico; and that such operation has been continued since that date, except for an interruption of service over which applicant had no control.

We further find that the present and future public convenience and necessity require operation by applicant as a common carrier by self-propelled vessels, in interstate or foreign commerce, in the transportation of commodities generally between the ports of New York and Texas City, by way of the same route; and that applicant is fit, willing, and able to continue the operation.

We further find that applicant is entitled to a certificate authorizing such operations, subject, however, to general conditions which are necessary to carry out, with respect to continuance of applicant's operations, the requirements of part III of the act and the orders, rules, and regulations of the Commission thereunder. For the reasons given above, that portion of the application seeking authority to transport passengers between New York and New Orleans will be denied.

A certificate issued to become effective on August 10, 1942, the body of which reads as follows:

Seatrain Lines, Inc. having filed applications under the provisions of section 309 (a) and (c) of the Interstate Commerce Act for a certificate of public convenience and necessity authorizing continuance of its operations as a common carrier by water, a full investigation of the matters and things involved having been made, and said division on the date hereof, having made and filed a report containing its findings of fact and

conclusions thereon, which said report is hereby referred to and made a part hereof;

It is hereby certified, That public convenience and necessity require the continuance of operations by Seatrain Lines, Inc., as a common carrier by self-propelled vessels, in interstate or foreign commerce, in the transportation of commodities generally between the ports of New York, N. Y., New Orleans, La., and Texas City, Tex., by way of the Atlantic Ocean and the Gulf of Mexico.

It is ordered, That said carrier be, and it is hereby, authorized to perform the service specified above, subject, however, to such terms, conditions, and limitations as are now, or may hereafter be, attached to the exercise of such authority by this Commission.

It is further ordered, That the holding of this certificate by said carrier be, and it is hereby, conditioned upon the exercise of the authority specified above, and upon compliance by said carrier with the requirements of the Interstate Commerce Act and the orders, rules, and regulations of the Commission thereunder.

It is further ordered, That the portion of the application seeking authority to transport passengers between New York and New Orleans be, and it is hereby, denied.

And it is further ordered, That this certificate and order shall take effect and be in force from and after August 10, 1942.

By the Commission, division 4.

3. About 18 months later, on December 18, 1943, the Commission, on its own motion, reopened the case for reconsideration, and by another order, dated January 27, 1944, it was provided:

It is ordered, That the said proceeding be, and it is hereby reopened for hearing upon the question of whether or not the said findings and certificate and order of July 2, 1942 should be modified so as to authorize applicant to continue to operate in service in which it was engaged, except for interruptions beyond its control, namely, as a common carrier by the "Seatrain" type of vessels in the transportation of liquid cargoes in bulk; of empty railroad cars, and of property loaded in freight cars received from and delivered to rail carriers and transported without transfer from the freight cars between the ports above mentioned.

And it is further ordered, That this proceeding be, and it is hereby assigned for hearing at the offices of the Commission in Washington, D. C., at 9:30 A. M. on February 28, 1944, before Commissioner Porter and Examiner Copenhafer.

4. A motion for vacation or rescission of the reopening order was filed by Seatrain on March 24, 1944, and renewed at the hearing of March 27, 1944.

5. No evidence was introduced at the March 27, 1944 hearing for the reasons stated but the motion for vacation of the reopening order was presented to the entire Commission and denied on April 3, 1944, "without prejudice to its renewal at the conclusion of the hearing to be held pursuant to said order of reopening."

6. Following the filing of petitions for intervention, which were granted, by the Ocean Steamship Company of Savannah, Agwilines, Inc., Eastern Steamship Company and the Bull Steamship Lines, the matter came on for further hearing before Commissioner Porter on April 24, 1944. Seatrain offered no evidence.

7. The entire Commission on May 8, 1944, by order, affirmed its earlier action overruling Seatrain's application to dismiss the proceedings for lack of jurisdiction in the Commission to proceed. The case was fully argued before the entire Commission on July 21, 1944.

8. On February 6, 1945, the Commission decided the case, three Commissioners dissenting, one concurring, and one Commissioner not participating. In its report the Commission made the following findings and conclusions.

> Upon reconsideration and hearing we find that the following facts among others have been established:
>
> 1. Applicant was engaged on and since January 1, 1940, except for interruptions beyond its control, in the operation of self-

propelled vessels designed for the transportation of (1) property when loaded in railroad cars, (2) empty railroad cars, and (3) liquid cargoes in bulk.

2. Applicant's vessels have all been taken over by the United States Maritime Commission and applicant is not now in operation and had not operated for several months prior to the date on which the certificate was issued by division 4.

3. Applicant was engaged on January 1, 1940, and continuously since, except for interruptions beyond its control, in the transportation by water, by self-propelled vessels, in interstate or foreign commerce, of liquid cargoes in bulk; of empty railroad cars, and of property loaded in railroad cars received from and delivered to rail carriers and transported without transfer from railroad cars, between the ports of New York and New Orleans by way of the Atlantic Ocean and the Gulf of Mexico.

4. Applicant is fit, willing, and able to continue operations instituted after January 1, 1940, between New York and Texas City, in the transportation by water, by self-propelled vessels, in interstate or foreign commerce, of liquid cargoes in bulk; of empty railroad cars, and of property loaded in railroad cars received from and delivered to rail carriers and transported without transfer from railroad cars, which operations are required by public convenience and necessity.

5. Applicant seasonably filed applications for authority to continue the operations described in paragraphs 3 and 4.

6. Applicant has not engaged in transportation of property in so-called "break-bulk" service, but has confined its operations exclusively to transportation of property loaded in railroad cars, of empty railroad cars, and of liquid cargoes in bulk in special tanks.

7. Applicant's operations, because of the special type and nature, have been recognized as superior to, and differing from those performed by the break-bulk lines.

8. The certificate now in effect by inadvertence erroneously describes the operations in which applicant was engaged on and since the "grandfather" date and during the interim period.

CONCLUSIONS

Upon hearing and reconsideration, we conclude that Seatrain Lines, Inc., is entitled to a certificate authorizing it to continue operations as a common carrier by water, by self-propelled vessels, in interstate or foreign commerce, in the transportation of liquid cargoes in bulk; of empty railroad cars, and of property loaded in railroad cars received from and delivered to rail carriers, and transported without transfer from the railroad cars, between the ports of New York, New Orleans, and Texas City by way of the Atlantic Ocean and the Gulf of Mexico; subject, however,

to general conditions which are necessary to carry out, with respect to the continuance of applicant's operations, the requirements of part III of the act and the orders, rules, and regulations of the Commission thereunder. In other respects the findings and conclusions of the prior report are affirmed.

The certificate and order heretofore entered in this proceeding will be superseded and cancelled, and a corrected certificate and order will be issued to conform to the record, and our findings herein.

9. In its report of February 6, 1945, the Commission, in answer to the contention that considerable expense had been incurred by plaintiff on the strength of the decision of Division 4, stated that although the proceeding had been twice set for hearing, no evidence was offered by plaintiff, consequently it found that "The record theretofore contains no specific showing in that respect".

10. On the same date as it issued its report, February 6, 1945, the Commission entered the following corrected certificate and order:

Further consideration having been had of the record in this proceeding, a hearing having been held, and the Commission on the date hereof having made and filed a report on reconsideration containing its findings of fact and conclusions thereon, which report, together with the prior report of

July 2, 1942, is hereby referred to and made a part hereof:

It is hereby certified, That public convenience and necessity require the continuance of operation by Seatrain Lines, Inc., as a common carrier by self-propelled vessels, in interstate or foreign commerce, in the transportation of liquid cargoes in bulk; of empty railroad cars; and of property loaded in railroad cars received from and delivered to rail carriers and transported without transfer from railroad cars between the ports of New York, N. Y., New Orleans, La., and Texas City, Tex., by way of the Atlantic Ocean and the Gulf of Mexico;

It is ordered, That said carrier be, and it is hereby, authorized to perform the service specified above, subject, however, to such terms, conditions, and limitations as are now, or may hereafter be, attached to the exercise of such authority by this Commission.

It is further ordered, That the holding of this certificate by said carrier be, and it is hereby, conditioned upon the exercise of the authority specified above, and upon compliance by said carrier with the requirements of the Interstate Commerce Act and the orders, rules, and regulations of the Commission thereunder.

It is further ordered, That the portion of the application seeking authority to transport passengers between New York and New Orleans be, and it is hereby, denied.

And it is further ordered, That the certificate and order issued on July 2, 1942, be, and it is hereby, superseded and cancelled as of the effective date of this corrected certificate and order; and that this corrected certificate and order shall take effect and be in force from and after May 21, 1945.

11. The effective date of the Commission's order and certificate, viz., May 21, 1945, has been voluntarily postponed until February 21, 1946.

12. On May 12, 1945, petitioner Seatrain filed its bill of complaint in this court alleging that the Commission's report and certificate of February 6, 1945, were beyond the authority of the Commission.

13. The United States filed an answer, denying the material allegations of the complaint; the Commission intervened in support of the validity of its order, and filed an answer to the same effect.

14. The proceeding was orally argued before a three-judge court, convened pursuant to statute, on July 20, 1945, and has been submitted to the court on briefs and reply briefs as well as oral argument. The entire record before the Commission was introduced in court at that time.

15. At the hearing before this court on July 20, 1945, petitioner, over objections of defendants, were permitted, subject to later ruling by the court on the objection, to introduce evidence *de novo* in court as appears from the opinion of the court, and the matter is now before this court for determination.

16. Seatrain has made substantial expenditures and commitments in reliance upon the original certificate issued by the Commission. If the order of the Commission of February 6, 1945 becomes effective Seatrain will incur large monetary losses.

Based on the foregoing findings of fact, the court makes the following:

CONCLUSIONS OF LAW

1. The court has jurisdiction of the parties and of the subject matter of this suit.

2. The motion of the defendants to strike the testimony of Mr. Brush, received on behalf of Seatrain, is denied.

3. The certificate issued by the Commission on July 2, 1942 was granted under the authority conferred upon the Commission under Section 309 (a) and 309 (d) of Part III of the Interstate Commerce Act.

4. The Commission lacked authority to enter its order of February 6, 1945 and to issue the corrected certificate pursuant thereto.

5. The order of the Commission of February 6, 1945, results in a confiscation of Seatrain's property without just compensation and without due process of law.

6. The order of the Commission of February 6, 1945, must be set aside.

For the Court:

(S) JOHN BIGGS, JR.,
United States Circuit Judge.

Dated: January 30, 1946.

In the District Court of the United States for the District of Delaware

CIVIL ACTION No. 579

SEATRAIN LINES, INC., PLAINTIFF

vs.

UNITED STATES OF AMERICA, AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS

ORDER

Before the Honorable John Biggs, Jr., United States Circuit Judge, Honorable Gerald McLaughlin, United States Circuit Judge, and Honorable Paul Leahy, United States District Judge, sitting pursuant to provisions of an act of Congress known as Urgent Deficiencies Act (38 Stat. L. 220) approved October 22, 1913.

This cause came on for final hearing on the 20th day of July, 1945 on plaintiff's petition, defendants' answers, and the evidence submitted by plaintiff and defendants, and arguments for plaintiff and defendants were heard. Upon consideration thereof, all of said judges concurring, the court being fully advised in the premises, and having filed in this cause its findings of fact and conclusions of law, do find in accordance with its written opinion filed in this cause that the plaintiff is entitled to the relief prayed.

It is accordingly ordered, adjudged, and decreed by the court:

That the order of the Interstate Commerce Commission entered on the 6th day of February, 1945, in Docket No. W–543, Seatrain Lines, Inc., Common Carrier Applications, a copy of which is attached to the bill of complaint as Exhibit No. "A", be, and the same is hereby, set aside and annulled, and its enforcement perpetually enjoined.

February 6th, 1946.

(S) JOHN BIGGS, JR.,
United States Circuit Judge.

(S) GERALD MCLAUGHLIN,
United States Circuit Judge.

(S) PAUL LEAHY,
United States District Judge.

Approved (as to form):

(S) WILBUR LA ROE, JR.,
Solicitor for Plaintiff.

(S) EDWARD DUMBALD,
Special Assistant to the Attorney General, Counsel for the United States of America, defendant.

(S) DANIEL W. KNOWLTON,
General Counsel, Interstate Commerce Commission, intervening defendant.

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In the Supreme Court of the United States

OCTOBER TERM, 1945

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

SEATRAIN LINES, INC.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF DELAWARE

MEMORANDUM FOR THE UNITED STATES AND INTERSTATE COMMERCE COMMISSION IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 959

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

SEATRAIN LINES, INC.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF DELAWARE

MEMORANDUM FOR THE UNITED STATES AND INTERSTATE COMMERCE COMMISSION IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 7, paragraph (3) appellants, the United States and Interstate Commerce Commission, file this statement opposing appellee's motion to dismiss or affirm. For a discussion of the nature and importance of the case and of the questions presented, we respectfully refer the Court to our jurisdictional statement. The following comments are directed to statements contained in appellee's motion to dismiss or affirm, which was served on appellants on March 11, 1946.

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In the motion to dismiss or affirm, it is stated that two and one-half years after the issuance of the original certificate by Division 4 on July 2, 1942, and after the expenditure of large sums by Seatrain in reliance upon the certificate, the Commission illegally canceled the original certificate and issued a new one changing the status of Seatrain from that of a common carrier of commodities generally to that of a car ferry. Section 309 (d) of the Interstate Commerce Act confers authority upon the Commission to impose terms and conditions at the time of the issuance of the certificate and "thereafter". Moreover, the original certificate issued by Division 4 on July 2, 1942, indicated on its face that it was not irrevocable, for it contained the following provision:

> It is ordered, That said carrier be, and it is hereby, authorized to perform the service specified above, subject, however, to such terms, conditions, and limitations as are now, or may hereafter be, attached to the exercise of such authority by this Commission.
>
> (Petition, Exhibit C.)

The facts are that while Division 4 on July 2, 1942, did authorize the issuance of a certificate to appellee, which appellee states in its motion "is the equivalent of a perpetual franchise", less than 18 months thereafter the full Commission notified appellee it would reconsider this case (Exhibit E to the petition). Appellee presented various objections to the reopening, which are mentioned

in our jurisdictional statement. Although the matter was set for hearing on two different occasions by the Commission, appellee, relying upon its position that the Commission had no authority to reconsider the provisions of a certificate once issued, declined to produce any evidence before the Commission. Consequently, as the Commission found, there was no evidence in the record before the Commission showing alleged commitments or expenditures made in reliance upon the certificate. Over appellants' objection, appellee was permitted to introduce evidence *de novo* in the District Court (through the testimony of appellee's president, Graham Brush) with respect to such claimed expenditures. We have assigned as error the ruling of the District Court permitting the introduction of such testimony, in view of appellee's declination to present it to the Commission, and this is one of the questions that this Court is called upon to decide. At this stage of the litigation, it is doubtful whether appellee has a right to rely upon such evidence, introduced for the first time in the District Court, as it does in Part II of its motion to dismiss or affirm, in support of its claim of large expenditures on the strength of the certificate.

In Part I of appellee's motion, it is argued that the Commission is entirely without statutory authority to revoke a certificate once issued to a common carrier by water. In the first place, the mere changing or limiting of a Division 4 certifi-

cate by the entire Commission does not constitute the revocation of a certificate. Instead, the certificate was merely corrected in order to assure to appellee the substantial parity of operations in the future which it had established in the past. Cf. *Alton R. Co.* v. *United States*, 315 U. S. 15, 22; *Noble* v. *United States*, 319 U. S. 88, 92. Secondly, Section 309 (d) of Part III of the Interstate Commerce Act, relating to the regulation of water carriers, authorizes the Commission "at the time of issuance [of a certificate] and from time to time thereafter" to impose such reasonable terms, conditions and limitations as the public convenience and necessity may require. It is submitted that this language warranted the Commission's taking the action it did here. See also Section 315 (c).

Appellee's motion depicts certain difficulties in connection with its being confined to the handling of freight in railroad cars. As this Court knows from prior decisions involving appellee, it has built up a special business of handling freight in loaded railroad freight cars. As was said in *United States* v. *Pennsylvania R. R. Co.*, 323 U. S. 612, 617, "The particular type of service introduced by Seatrain, and found by the Commission to be qualitatively superior, cannot be rendered without the privilege of carrying the very railroad cars which carry freight to its ports". Consequently, the entire Commission properly found that Seatrain was entitled to continue operation

as a common carrier by water, in interstate or foreign commerce, by self-propelled vessels, in the transportation of liquid cargoes in bulk; of empty railroad cars, and of property loaded in railroad cars received from and delivered to rail carriers and transported without transfer, between the ports of New York, N. Y.; New Orleans, Louisiana; and Texas City, Texas, by way of the Atlantic Ocean and the Gulf of Mexico (Petition, Exhibit B, p. 53). Appellee's argument that once a certificate issues, it is irrevocable in the absence of fraud, abandonment, etc., runs counter to the plain terms of Sections 309 (d) and 315 (c). Furthermore, if appellee's contention were correct that Section 315 (c) authorizes the Commission to suspend, modify or set aside only regulatory orders and not certificates, the District Court, which is confined to review of the Commission's orders under the Urgent Deficiencies Act (28 U. S. C. 44, 47), would have no authority to entertain this suit.

It is difficult to understand how the appellee could have made any extensive commitments in reliance upon Division 4's certificate. As this Court said in *Interstate Commerce Commission* v. *Hoboken R. Co.*, 320 U. S. 368, 376, "since February, 1942, Seatrain's vessels have been in Government service and Seatrain's service has been discontinued." This was during the very period that the entire Commission in this case was reconsidering the action of Division 4. In any event, appellee declined to present to the Commission

any testimony or evidence showing expenditures or commitments on the strength of Division 4's certificate, although afforded two opportunities to do so. Accordingly, the Commission concluded "The record therefore contains no specific showing in that respect" (Petition, Exhibit B, p. 50). The District Court's finding to the contrary was based entirely on new testimony introduced for the first time in court and not presented to the Commission. We think the court below erred in permitting the Commission's order to be annulled on a record other than that made before the Commission, and we have presented this question, among others, in our assignments of error.

In its motion, appellee also contends that the Commission may not correct a water carrier's certificate without violating the Fifth Amendment. Such a question is obviously one for resolution by this Court after argument on the merits.

It is respectfully submitted that the motion to dismiss or affirm should be denied and probable jurisdiction noted.

J. HOWARD MCGRATH,
Solicitor General.

WALTER J. CUMMINGS, JR.,
Special Assistant to the Attorney General.
DANIEL W. KNOWLTON,
Chief Counsel,
E. M. REIDY,
Assistant Chief Counsel,
Interstate Commerce Commission.
MARCH 1946.

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No. 61

In the Supreme Court of the United States

OCTOBER TERM, 1946

UNITED STATES AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

SEATRAIN LINES, INC.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF DELAWARE

BRIEF FOR THE UNITED STATES AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

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In the Supreme Court of the United States

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No. 61

UNITED STATES AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

SEATRAIN LINES, INC.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF DELAWARE

BRIEF FOR THE UNITED STATES AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

OPINIONS BELOW

The opinion of the District Court (R. 119) is reported at 64 F. Supp. 156. The report of the Interstate Commerce Commission here involved (R. 23), dated February 6, 1945, is reported at 260 I. C. C. 430. The original report of Division 4 of the Commission (R. 53), dated July 2, 1942, which was modified by the full Commission, is not reported.

JURISDICTION

The final decree of the District Court was entered on February 7, 1946 (R. 132). The petition

for appeal was filed February 27, 1946 (R. 133), and was allowed on the same day (R. 134). Probable jurisdiction was noted on April 22, 1946 (R. 433). The jurisdiction of this Court rests on the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 208, 219–221, 28 U. S. C. 45, 47a, and Section 238 of the Judicial Code, as amended by the Act of February 13, 1925.

STATUTES INVOLVED

Pertinent provisions of the Interstate Commerce Act are set forth in the Appendix, *infra*, pp. 67–74.

QUESTIONS PRESENTED

1. Whether, after issuing a certificate to a water carrier authorizing it to perform specified service, "subject, however, to such terms, conditions, and limitations as are now, or may hereafter be, attached to the exercise of such authority by this Commission," the Interstate Commerce Commission may, after hearing, modify the certificate so as to confine the carrier to the substantial operations which it had conducted in the past, or which, as to operations not protected by the "grandfather" clause, the Commission found were required by public convenience and necessity.

2. Whether an order of the Interstate Commerce Commission modifying a certificate theretofore issued to a water carrier may be set aside

by a district court on the basis of evidence showing the carrier's alleged commitments made on the strength of the original certificate, where the carrier repeatedly declined to introduce that or any other evidence before the Commission at the modification hearings.

STATEMENT

Acting under the provisions of Part III of the Interstate Commerce Act, 49 U. S. C. 901–923, as added by the Transportation Act of 1940, c. 722, 54 Stat. 898, 929–952, appellee Seatrain Lines, Inc., filed two applications on May 29, 1941, in the first of which it sought a certificate under the "grandfather" clause of Part III, Section 309 (a), authorizing *continuance* of operation as a common carrier by water, in interstate or foreign commerce, in the transportation of commodities generally and passengers between New York and New Orleans, La., via the Atlantic Coast and the Gulf of Mexico (R. 214), and in the second of which it sought a certificate under Sections 309 (a) and (c) authorizing *continuance* of an operation (termed an *interim* operation) instituted between January 1, 1940 (the critical date under the "grandfather" clause) [1] and February 1, 1941, as a common carrier by water, in inter-

[1] Seatrain's "grandfather" application sought authority to transport "all commodities *permitted by law*" (R. 215). The italicized words were added by Seatrain to the Commission's form used in these proceedings (R. 205).

state or foreign commerce in the transportation of commodities generally between New York and Texas City, Texas, by way of the Atlantic Ocean and the Gulf of Mexico (R. 236). The two applications were consolidated, and were disposed of in one report (R. 23, 53).

In its application under the "grandfather" clause, Seatrain described its operation as a "regular weekly service (inaugurated in 1932) in each direction between the Port of New York and the Port of New Orleans, via Havana, Cuba, or direct" (R. 218); it also advised that Seatrain has continued "to operate as above stated" (R. 218). Attached to the application was an affidavit of its vice-president, E. K. Morse, dated May 28, 1941, in which he asked the Commission to refer to its findings in prior cases involving Seatrain (R. 230–231).[2]

Seatrain's application as an "interim" operator between New York and Texas City, Texas, contained substantially the same information, except that its financial condition, necessary to be

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[2] See *Investigation of Seatrain Lines, Inc.*, 195 I. C. C. 215, 206 I. C. C. 328; *Seatrain Lines, Inc.* v. *Akron, C. & Y. Ry. Co.*, 226 I. C. C. 7, 243 I. C. C. 199, 259 I. C. C. 297; *Hoboken Mfrs. R. Co.* v. *Akron, C. & Y. Ry. Co.*, 234 I. C. C. 114; *Hoboken Mfrs. R. Co.* v. *Abilene & S. Ry. Co.*, 237 I. C. C. 97, 248 I. C. C. 109.

For cases in which Seatrain's operations have been before this Court, see *Interstate Commerce Commission* v. *Hoboken Manufacturers' R. R. Co.*, 320 U. S. 368, and *United States* v. *Pennsylvania R. R. Co.*, 323 U. S. 612.

shown for an operator conducting a new service, was more fully developed (R. 257–264).

An examiner of the Commission conducted a field examination concerning Seatrain's operations and recommended that its application be granted (R. 323). In his return to the questionnaire submitted to the Commission, the following information was set out (R. 273):

> Q. 8. Does the nature of the commodities transported require special facilities or equipment?
>
> A. Yes. If answer is "Yes," describe. The vessels are especially designed to carry approximately one hundred (100) loaded freight-train cars. The cars are transferred to the vessels by means of especially constructed bridge cranes. The vessels are also equipped with tank compartments for the shipment of fuel oil.

In an affidavit of Mr. Hodgson, vice-president of Seatrain, reference to testimony in prior Commission proceedings was made, and it was stated (R. 288):

> As a matter of fact the Commission has itself in numerous proceedings on extensive records so fully investigated the public interest in Seatrain's operations and in the type of transportation service which it affords, and has so definitely found that Seatrain provides a type of transportation which is required by the public interest that

its own decisions would seem to afford a controlling precedent here. From the standpoint of the character of the service which Seatrain's facilities and type of vessels make possible and the transportation economies resulting from its method of operation, its service between Texas City and Hoboken is in practically all respects similar to its service between New Orleans and Hoboken and the findings of the Commission as to the public interest in connection with the latter are equally applicable in connection with the former.

Without further proceedings, Division 4 of the Commission, consisting of three members, issued its report (R. 53) wherein the Division found:

> We find that Seatrain Lines, Inc., was in bona fide operation on January 1, 1940, as a common carrier by self-propelled vessels, in interstate or foreign commerce, in the transportation of commodities generally between the ports of New York and New Orleans, by way of the Atlantic Ocean and the Gulf of Mexico; and that such operation has been continued since that date, except for an interruption of service over which applicant had no control.
>
> We further find that the present and future public convenience and necessity require operation by applicant as a common carrier by self-propelled vessels, in interstate or foreign commerce, in the transportation of commodities generally between the ports of New York and Texas City, by way

of the same route; and that applicant is fit, willing, and able to continue the operation.

We further find that applicant is entitled to a certificate authorizing such operations, subject, however, to general conditions which are necessary to carry out, with respect to continuance of applicant's operations, the requirements of part III of the act and the orders, rules, and regulations of the Commission thereunder. For the reasons given above, that portion of the application seeking authority to transport passengers between New York and New Orleans will be denied. (R. 56.)

A certificate authorizing the above operations was issued by Division 4 on July 2, 1942, to become effective August 10, 1942 (R. 52). That certificate read in part as follows (R. 52):

It is hereby certified, That public convenience and necessity require the continuance of operations by Seatrain Lines, Inc., as a common carrier by self-propelled vessels, in interstate or foreign commerce, in the transportation of commodities generally between the ports of New York, N. Y., New Orleans, La., and Texas City, Tex., by way of the Atlantic Ocean and the Gulf of Mexico.

It is ordered, That said carrier be, and it is hereby, authorized to perform the service specified above, subject, however, to such terms, conditions, and limitations as are now, or may hereafter be, attached to the

exercise of such authority by this Commission.

It is further ordered, That the holding of this certificate by said carrier be, and it is hereby, conditioned upon the exercise of the authority specified above, and upon compliance by said carrier with the requirements of the Interstate Commerce Act and the orders, rules, and regulations of the Commission thereunder.

This is the certificate which the court below held was beyond the power of the Commission to modify.

Thereafter, on December 18, 1943, Division 4 in *Foss Launch & Tug Co. Applications,* 260 I. C. C. 103, found that "Freight-car ferry service is a special kind of transportation not embraced within the term 'transportation of commodities generally' by water", and accordingly reopened the Seatrain case for reconsideration on the same day, to consider whether the certificate issued properly described seatrain's operations on and since January 1, 1940 (R. 24).[3] On January 27, 1944, the Commission ordered (R. 68):

> That the said proceeding be, and it is hereby reopened for hearing upon the question of whether or not the said findings and certificate and order of July 2, 1942,

[3] That certificate was too narrow since it did not permit Seatrain to engage in its own characteristic operations, and too broad in that it permitted Seatrain to become a common carrier of commodities not already loaded into cars.

should be modified so as to authorize applicant to continue to operate in service in which it was engaged, except for interruptions beyond its control, namely, as a common carrier by the "Seatrain" type of vessels in the transportation of liquid cargoes in bulk; of empty railroad cars, and of property loaded in freight cars received from and delivered to rail carriers and transported without transfer from the freight cars between the ports above mentioned.

A motion to vacate and rescind the reopening order was filed by Seatrain on March 24, 1944 (R. 69), and renewed at the hearing of March 27, 1944. (R. 331.) At that hearing, Mr. McCollester, counsel for Seatrain, stated (R. 330):

> I am directed by my client to inform the Commission that until our motion is passed upon, and if the Commission wishes argument on it we are, of course, prepared to argue it more fully; but until our motion is acted upon, we are not prepared to go forward with any evidence.
>
> Commr. PORTER: Well, I will overrule the motion. Of course, you know without my advising you at all, you have of course a perfect right of appeal to the entire Commission, but at the same time I will overrule the motion.

A Commissioner was designated to hear the case (R. 329), because of its importance. No evidence was introduced at the March 27, 1944,

hearing for the reasons stated by Mr. McCollester, but his motion to vacate the order of reopening was presented to the entire Commission and denied on April 3, 1944, "without prejudice to its renewal at the conclusion of the hearing to be held pursuant to said order of reopening" (R. 78). Thereafter, following the filing of petitions for intervention by the Ocean Steamship Company of Savannah, Agwilines, Inc., Eastern Steamship Lines and the Bull Steamship Line (R. 347–351), which were granted (R. 347–350), the matter came on for further hearing before Commissioner Porter on April 24, 1944 (R. 337).

At this rehearing, Mr. McCollester said (R. 339):

> Mr. McCollester. Mr. Commissioner, we have no evidence to offer. Our application was filed, the supporting data was presented in support of the two applications.
>
> The certificates have been issued and have been in effect for a year and a half or more, and therefore, we do not conceive that there is any question of fact that can now be before the Commission in regard to them, and, consequently, we have no evidence.

After appellee thus declined to produce evidence, Commissioner Porter referred in detail to the record the Commission would have before it in its consideration of the case (R. 340–343), including the prior decisions of the Commission relating to

Seatrain (R. 341); the two applications filed May 28, 1941, with accompanying affidavits and exhibits (R. 342); the report of Examiner Martin and the questionnaire and affidavit attached thereto (R. 342); and certain letters concerning the development of the Seatrain service and its use by shippers (R. 342–343). After the Commissioner had detailed the record as above, Mr. McCollester said (R. 343):

> Mr. McCollester. I thank Your Honor for bringing those matters to our attention. If I correctly understand, all of the material to which Your Honor has referred, is material which was presented in connection with the applications considered by the Commission in issuing its order of July 2, 1942, which contains certificate and was the material upon which that certificate was based.
>
> If that clearly appears, of course, we, ourselves, would want that. We want to have that clearly understood. The only objection we would have to the consideration by the Commission at this time, or the receipt for purposes of consideration of any evidence or material of any sort in the nature of factual information which was not before the Commission and was not considered by it in issuing the certificate.
>
> Commr. Porter. Well, Counsel understands of course that the reports of the Commission to which I have referred and identified in the record here, were all mat-

ters of our records and were before us at the time, and were available to us at the time we issued the certificates.

Mr. McCollester. That is right.

The entire Commission on May 8, 1944, by order, affirmed its earlier action overruling Seatrain's application to dismiss the proceedings for lack of jurisdiction (R. 351) and the matter was fully argued before the entire Commission on July 21, 1944 (R. 371). At that argument Mr. McCollester stated his position as follows (R. 377):

> Commr. Porter. Well, your point briefly is that this Commission when it once issues a certificate that that ends it and that it loses its power to change, alter, or modify it in any respect whatsoever? Isn't that your motion?
>
> Mr. McCollester. Yes, Mr. Commissioner; if there is no fraud or misrepresentation and if there is full disclosure of the facts and if action has been taken by the applicant in reliance upon the rights granted.

After referring to prior Commission decisions, counsel for appellee stated (R. 378):

> Now we naturally in those proceedings stressed the non-break-bulk feature of Seatrain service, the movement of freight in railroad cars, and your Honors will find that in the first of those proceedings, the Seatrain investigation by the Commission

on its own motion in which the development of Seatrain was described, and it was made very clear by the testimony of Mr. Brush that the first motive in the development of the Seatrain ships and other handling facilities was one of operating efficiency in the operation of a water carrier to eliminate stevedoring expense of handling the cargo at the ports and the delay to vessels incident to the ordinary break-bulk operation. That that was the motive which led to the research which in turn produced the Seatrain ships and the handling facilities. That likewise they provided benefits to shippers in the handling of their freight at the port, but your Honors will recall that in the several rate cases before you you have found that those benefits from the standpoint of shippers were not such as to justify higher rates than the rates contemporaneously in effect via the break-bulk lines, and the evidence very definitely showed that Seatrain Lines was in competition with the break-bulk lines for the handling of the same type of freight.

Later the following colloquy ensued between counsel and the Commissioners (R. 380–381):

> I would say this, that the certificates which have been issued, if there was no fraud or misrepresentation or failure of full disclosure in the applications for the certificates, if they have become effective, you cannot now revoke any of the rights,

and they are entitled to all of the rights which would accrue under the language of the certificate.

Commr. PORTER. Forever and a day.

Mr. MCCOLLESTER. Forever and a day, so long as they do not abandon. If they abandon, that is another matter. It seems to be pretty well established by the decision of the courts that in the event of abandonment a certificate may be cancelled.

* * * * *

Chairman PATTERSON. As a matter of fact, do you or do you not during the critical period handle this freight in railroad cars always, or is it sometimes handled otherwise?

Mr. MCCOLLESTER. I understand it was sometimes handled otherwise, Mr. Commissioner. I would not misrepresent the facts to the Commission, *although we have avoided intentionally representing the case here on a factual basis because we do want to raise only the question of law as to your power and therefore we have not presented proof, which we had an opportunity to do, I would say,*[4] but we actually carry, and how we actually carry it. I would not want to mislead you and suggest that we carry any substantial portion of our business other than in railroad cars, but there was some, and you can call it "consider-

[4] Compare this admission with the statement made to the district court that Seatrain had not been "invited" to present testimony to the Commission (R. 194).

able", depending upon what the word "considerable" means, and looking toward the future, the limitation of having to have to handle freight in railroad cars is a very serious limitation. [Italics added.] (R. 391.)

The Commission decided the case on February 6, 1945, rendering a full report (R. 23); *Seatrain Lines, Inc., Common Carrier Applications,* 260 I. C. C. 430. It held that, since Seatrain had never carried commodities generally, it was entitled to continue operations as a common carrier only in the transportation of liquid cargoes in bulk, of empty railroad cars, and of property loaded in railroad cars received from and delivered to rail carriers and transported without transfer between New York and New Orleans and Texas City. The Commission directed the issuance of a corrected certificate and order to give effect to the report. The Commission made findings of fact and conclusions of law. 260 I. C. C. at 443–445; R. 38–39. Three Commissioners dissented, two on the ground that the Commission had no power as a matter of law to vary the former certificate, and one for the reason that this power, which he felt existed, should not here be exercised. One Commissioner took no part.

The gist of the Commission's report was that Seatrain's traffic, with the exception of a small amount of liquid cargo carried in the vessel's

tanks, was handled in freight cars from origin to destination, in non-break bulk service; that the New York-Texas City service was in all respects similar to the New York-New Orleans service; and that, through inadvertence, the original certificate did not correctly describe the operations in which, according to the record, applicant was engaged on and since the "grandfather" date. Accordingly, the question was whether, in the absence of fraud or misrepresentation, the Commission had power to correct a certificate thus inadvertently issued. The Commission held that, under Sections 315 (c) and (d), it had complete control over its orders, and ought at any time recall or amend them whenever error appeared; that the certificate was in terms subject to "such terms, conditions, and limitations as are now, or may hereafter be, attached to the exercise of such authority by this Commission," under Section 309 (d); and that the proviso in Section 309 (d), prohibiting the imposition of terms, &c., which restrict the right of the carrier to add to its equipment and facilities, would be meaningless if the Commission lacked power to modify a certificate except for fraud or misrepresentation. The Commission stated that its power to correct a certificate would be sparingly exercised, and so as to avoid, if practicable, any adverse effect on vested rights, but noted that the record contained no showing as to any commitments by Seatrain

on the strength of the certificate. (R. 37.) Indeed, as the Commission pointed out, Seatrain had not operated under the certificate since all its vessels had been requisitioned by the Maritime Commission. (R. 27.)

The petition to set aside the Commission's report and order of February 6, 1945, was filed in the court below on May 12, 1945 (R. 2–81). Broadly speaking, the petition alleged that the Commission had no authority to change a certificate once it had been issued; that the authority conferred by Section 315 (c) to impose terms and conditions after the issuance of the certificate relates merely to "service" conditions, and did not authorize the Commission to change a certificate in the manner it sought to do here, and that to hold otherwise would deprive plaintiff of its property without due process of law in violation of the Fifth Amendment (R. 21).

It was urged in the district court that the carrier could not accept and deliver certain traffic under the amended certificate that it had been accepting and delivering for many years prior to the enactment of the Transportation Act of 1940 (R. 149). Allegations concerning lack of evidence to support the Commission's conclusion were also made (R. 20).

Appellee conceded before the district court that the great bulk of Seatrain's business was in cars (R. 153, 189–190), though claiming that its status

was that of a common carrier generally handling "thousands of commodities" (R. 172). Pressed by the court, counsel then admitted that, aside from shipments in cars, they had handled many commodities, but quickly conceded that the record did not show what they consisted of, except he could recall "crude rubber" (R. 172).[5]

The district court found, contrary to the finding of the Commission, that Seatrain, in addition to its freight-car business, "transported commodities generally" (R. 120). It held, based on testimony introduced over appellants' objections (R. 143), that Seatrain "has made substantial expenditures and important commitments for the future" on the strength of the original certificate (R. 121). In support of this finding it relied on the testimony of the witness Brush (R. 125), which testimony was neither presented nor sought to be presented to the Commission.

The court found that Seatrain had an opportunity to present evidence to the Commission, of which it did not avail itself (R. 121). The court held that the authority conferred on the Commission by Section 309 (d) to impose terms and conditions "at the time of issuance [of the certificate] and from time to time thereafter", did not authorize the Commission to take the action it did (R. 122), and that Section 315 (c) of the

[5] We have been unable to find support for even this one commodity, speaking now of traffic moving in other than railroad cars.

Act, authorizing the Commission to modify, suspend, etc., its orders in such manner as it shall deem proper, did not apply to the cancellation of a certificate, but only to "regulatory orders" (R. 123). It refused to hold that the certificate had the effect of a "franchise", deeming this question relatively unimportant (R. 124). And, in the face of the Commission's finding (260 I. C. C. at 444, Fdg. 8; R. 39) that the original certificate was issued "by inadvertence", the court below held that this certificate was not issued by inadvertence but represented the Commission's considered judgment (R. 124–125).

Accordingly, the court concluded that the Commission had no authority to correct its earlier certificate and that its order of February 6, 1945, resulted in an uncompensated confiscation of Seatrain's property (R. 125). By decree dated February 7, 1946, the court set aside the Commission's order (R. 132).

SUMMARY OF ARGUMENT

I

Seatrain's operations were correctly reflected by the amended certificate and incorrectly reflected by the original certificate.

As to the New York-New Orleans traffic, protected by the "grandfather" clause, Seatrain was entitled to a certificate granting it substantial parity with what it was doing when the Act was

passed. Prior reports of the Commission made it abundantly clear that Seatrain's vessels carried only cargo in railroad cars (other than a small amount of liquids in the vessels' tanks) and carried such cargoes only between ports at which special loading facilities had been provided; and, moreover, that it never carried "commodities generally." Consequently the original certificate went beyond the terms of the Act, which permitted only a "continuance" of existing operations. Seatrain can do everything under the amended certificate that it ever did in the past. To sustain the original certificate in perpetuity would unsettle what the "grandfather" clause was designed to stabilize.

As to the New York-Texas City route, the record shows a precisely similar kind of operations. These operations, likewise, were correctly reflected by the amended certificate and incorrectly reflected by the original certificate. The original and the amended certificates covered both routes, and that circumstance has never been seriously objected to.

When the Commission modified the original certificate, it did so in strict compliance with the modification proviso therein contained. The inclusion in the certificate of a continuing power on the part of the Commission to limit or condition the authority therein granted was based on Section 309 (d) of the Act. If the Commission

were without power of modification except in cases of fraud or misrepresentation, then the proviso to Section 309 (d), prohibiting modification through the imposition of particular kinds of restrictions, would be meaningless. Nor can the scope of Section 309 (d) be limited by suggesting that it was intended to cover only modifications in respect to matters which are the subject of other sections of the Act. Analogous cases under Part II of the Act support the construction of Section 309 (d) adopted by the Commission.

Moreover, even if the original certificate had been unconditional in its terms, without the inclusion of a reserved power to alter or amend, the Commission would have had power to modify it by virtue of Sections 315 (c), (d), and (e), and of Section 17 (7); the latter provision is made applicable here by Section 316 (a). In view of those provisions, it seems unnecessary to inquire whether the action of Division 4 in issuing the original certificate was occasioned "by inadvertence," as found by the Commission, or whether it resulted from "the considered judgment of Division 4," as held by the court below, even though there seems no justification for the court's disregard of a specific finding as to the Commission's mental processes. In any event, by the plain language of Section 17 (7), the

original certificate was subject to reconsideration and modification.

No question of revocation is involved; the Commission is neither terminating Seatrain's rights nor barring it from the sea. Modifications of certificates which extend rights previously granted have frequently been made by the Commission, and never questioned. While the modification here involved was restrictive, and to that extent a revocation *pro tanto,* Congress cannot have intended to permit only such modifications as grant greater rights, to the exclusion of restrictive ones. And the modification here involved was in no fair sense a revocation, since the amended certificate authorizes Seatrain to operate precisely as it has always operated in the past.

It is not necessary to determine whether the original certificate was a franchise, although in view of Section 309 (e) the argument that it was hardly seems tenable. But even assuming *arguendo* that a franchise was granted, it was by its terms a variable franchise which the grantor has duly varied. Moreover, being issued under an Act which conferred on the Commission power to modify its orders and certificates, the "franchise" is clearly subject to modification in accordance with the statutory provisions. Calling the original certificate a "franchise" does not alter the result.

II

The district court found, on testimony first offered at the hearing there, that Seatrain had made large expenditures in reliance on the original certificate, that it will incur large losses if the order issuing the amended certificate goes into effect, and that this would amount to an unconstitutional confiscation. Seatrain several times advisedly declined to present this or any other evidence before the Commission, although this proof might well have affected the result, since the Commission indicated it would not ordinarily alter certificates if vested rights had accrued in reliance thereon.

The situation here is one where, on the precise issue of the Commission's naked legal power to modify a certificate, the court on one record decides that the Commission erred in a result which it reached on another record. This was plain error; when administrative orders are sought to be set aside in the courts, evidence which was not before the administrative agency may not be received. Here the issue before the court was identical with the issue before the Commission. Seatrain has sought judicial review without first exhausting its administrative remedies. It cannot, by recasting its assertion of the Commission's lack of power to modify a certificate in generalized terms of unconstitutional confiscation, proceed to support that assertion in the courts with testimony

which it refused to present to the Commission. To permit it to do this, as the court below did, turns judicial review into a species of legal shell game in which the same question receives different answers before different tribunals as testimony which is withheld at one juncture is suddenly produced at another.

ARGUMENT

I. THE INTERSTATE COMMERCE COMMISSION'S MODIFICATION OF THE ORIGINAL CERTIFICATE ISSUED TO SEATRAIN WAS IN CONFORMITY WITH THE TERMS OF THAT CERTIFICATE, AND WAS REQUIRED BY THE EVIDENCE AND BY THE TERMS OF THE INTERSTATE COMMERCE ACT

The only substantive question presented for decision is whether, where the Interstate Commerce Commission has issued a certificate to a water carrier authorizing it to perform specified service, "subject, however, to such terms, conditions, and limitations as are now, or may hereafter be, attached to the exercise of such authority by this Commission," and where such a certificate grants the carrier rights to which it is clearly not entitled under Part III of the Interstate Commerce Act, the Commission may, after hearing, modify the certificate to confine the carrier, in respect of operations protected by the "grandfather" clause, to those operations which it had conducted in the past, and, as to operations

not so protected, to such as the Commission found were required by public convenience and necessity.

The present case does not present any question of the Commission's powers to modify a certificate unconditional in its terms, so as to bring it into conformity with the facts and the law, although, as we shall point out below, the Act is amply broad enough to empower the Commission to act in such a situation also. Nor does the present case raise the question whether the certificate first issued the carrier amounts to a perpetual franchise, as Seatrain contends; for even if, contrary to the express terms of Section 309 (e),[6] it be so considered, it was by its terms a variable franchise, which the Commission duly varied. Finally, though we doubt the district court's right to hold that the original certificate represented the Commission's considered judgment, in the light of the Commission's specific finding that it was issued "by inadvertence", we deem it unnecessary to resolve that question, for in either event, as we shall show, Seatrain is precluded by the plain terms of the Act from asserting a vested and irrevocable right to profit from the Commission's error.

It seems appropriate also to state at this juncture, in view of the distinction between the New

[6] "No certificate issued under this part shall confer any proprietary or exclusive right or rights in the use of public waterways." Section 309 (e), 49 U. S. C. 909 (e).

Orleans and Texas City Routes,[7] that in both instances the Commission's power to amend the certificate to conform to what the Act commanded it to grant is the same. The circumstance that, in one instance, the certificate is to be based on a determination of historical fact, and, in the other, is to be based on a determination of public convenience and necessity made in the exercise of an expert judgment as to the nation's transportation needs, is quite immaterial on the issue of the Commission's power to amend the certificate, in accordance with its terms, so that it may correctly reflect the facts which the Commission was required to determine.

A. SEATRAIN'S OPERATIONS WERE CORRECTLY REFLECTED BY THE AMENDED CERTIFICATE AND INCORRECTLY REFLECTED BY THE ORIGINAL CERTIFICATE

We turn first to a consideration of the evidence before the Commission and of the policy of the Act, for, as we shall show, the provisions of the Interstate Commerce Act, in the light of

[7] Since 1932, appellee has been engaged in New York Harbor-New Orleans operations with the Seatrain type of vessel (R. 229). The application for continuance of this service is under the "grandfather" clause, Section 309 (a), Part III, of the Interstate Commerce Act.

The new operation between New York Harbor and Texas City, instituted after the critical "grandfather" date of January 1, 1940, is governed by the public convenience and necessity section of Part III of the Interstate Commerce Act, section 309 (c), and the tests to be applied are different from the "grandfather" tests.

the facts appearing in the record presented to the Commission, required the precise amendment of the certificate which the Commission made.

(*i*) *The New York-New Orleans Traffic*

As we have already pointed out, Seatrain's rights in its New York-New Orleans traffic are within the "grandfather" clause of Part III of the Act, Section 309 (a). This section is in all respects similar to the cognate provision of Part II, Section 206 (a), which has frequently been before this Court. The purpose of such a provision was to establish "substantial parity between future operations and prior *bona fide* operations." *United States* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475, 481. Insofar as the necessary determination "whether an applicant seeking exemption had in fact been in operation within the immunizing period of the statute was bound to raise controverted matters of fact. Their determination Congress entrusted to the Commission." *United States* v. *Maher*, 307 U. S. 148, 153–154. The applicable standards have but recently been discussed here. *Crescent Express Lines* v. *United States*, 320 U. S. 401, 409–410:

> The statute, we have said, contemplated "substantial parity" between future and prior operations. *Alton R. Co.* v. *United States*, 315 U. S. 15, 22. "As the Act is remedial and to be construed liberally, the

proviso defining exemptions is to be read in harmony with the purpose of the measure and held to extend only to carriers plainly within its terms." *McDonald* v. *Thompson,* 305 U. S. 263, 266; *Gregg Cartage Co.* v. *United States,* 316 U. S. 74, 83. Consequently we held in *United States* v. *Maher,* 307 U. S. 148, that operations over irregular routes did not provide the requisite continuity to support an application for regular service between fixed termini, even when the highway between the fixed termini had been occasionally used for part of the distance in the irregular route operations.

When the Commission requires the applicant under the grandfather clause to limit its future operations to the type of equipment and service previously offered, it acts within its power and in accord with the purpose of Congress to maintain motor transportation facilities appropriate to the needs of the public. S. Rep. No. 482, 74th Cong., 1st Sess. If there is a need for a different type of service for this transportation, applications may be filed under § 307.

Under the "grandfather" clause, therefore, Seatrain was entitled to a certificate granting it substantial parity with what it was doing when the Act was passed. To that we turn; and we examine at the outset the many reports concerning Seatrain which the Commission already had

before it, and which Seatrain asked the Commission to consider (R. 341).

We set forth here, as a matter of convenience to the Court, pertinent excerpts from the Commission's reported decisions which discuss the details of Seatrain's operations.

Investigation of Seatrain Lines, Inc., 195 I. C. C. 215 (decided July 11, 1933):

> Seatrain owns three vessels designed to transport by water freight brought to or moved from ports by railroads without transferring the freight from the cars, thereby avoiding delays and expenses incident to ordinary steamship operation. * * * [p. 218].
>
> While the original vessel has tank space for 2,200 tons of liquid cargo, and the new vessels have tank space for 4,000 tons of liquid cargo, each vessel is designed primarily for transportation of cargo only when loaded in railroad cars. * * * These vessels can handle cargo in railroad cars only between ports at which special loading facilities have been provided. Such facilities have been provided at only three ports, namely, Hoboken, New Orleans, and Havana [p. 219].

At pp. 219–220 of the same report, the Commission went on to describe Seatrain's vessels and method of loading and unloading.

The Commission further said (pp. 221–222, 228–229):

* * * It is admitted that the Seatrain vessels could not operate as they are intended to operate and as they are now operated without the loading devices that make possible the transfer of cars between the tracks on the vessels and the tracks of the Hoboken and of the New Orleans & Lower Coast, or without the use of railroad cars, or without the cooperation of a railroad at each of these terminals.

* * * * *

The vessel used by Seatrain is far larger and of a different type than the vessel envisaged when the word "ferry" or "car ferry" is mentioned. Its method of operation is not the method used in operating any other ferry here or elsewhere in the world. The nature of service rendered, while similar, is not the same as that rendered by ferries. * * * We assume that Congress in including and maintaining ferries in the term railroad had in mind the type of vessel then currently commonly known as a ferry, and not a vessel which, as we have seen, is of a type then unknown and which is still unique in function. * * *

* * * * *

So far as appears, none of the traffic transported by Seatrain in railroad cars can be handled without the intervention of the Hoboken or the New Orleans & Lower Coast, or except in accordance with some of the extraordinary arrangements with those companies. Except as to the transportation of a comparatively small amount

> of liquid cargo in the ships' tanks, it is impossible for Seatrain to operate as it is intended to operate and as it is operated without the special arrangements with connecting railroads for the continuous carriage of freight in railroad cars and without cooperation of such connecting railroads, * * *.

The next report in which Seatrain operations came before the Commission is *Investigation of Seatrain Lines, Inc.*, 206 I. C. C. 328, decided February 5, 1935. There the Commission said (p. 335):

> * * * The Seatrain method of transportation was developed for the purpose of eliminating the expenses, disadvantages, and delays incident to the transfer of lading between railroad freight cars and the holds of vessels. By means of the loading machinery described in the original report, loaded freight cars are lifted from the tracks of the connecting railroad at one port, deposited on the Seatrain vessel, which carries them to the port of destination, lifted from the vessel to the tracks of the connecting railroad, and moved to final destinations without having the contents disturbed in any way. The service performed by Seatrain is generally conceded to be superior to that afforded by steamships of the usual type.
>
> By using Seatrain service, shippers obtain what is practically equivalent to all-rail service, except for the somewhat longer

time in transit, at rates less than the all-rail rates. They are also saved packing and handling expenses necessarily incurred if the movement is over the break-bulk water routes. In addition, certain classes of bulk freight which cannot be handled in vessels of the usual type, and which cannot bear the all-rail charges, can be handled by Seatrain, and thus markets opened up for them which theretofore could not be reached.

On January 28, 1938, the Commission decided the case of *Seatrain Lines, Inc.* v. *Akron, C. & Y. Ry. Co.*, 226 I. C. C. 7. In that report, the Commission said (p. 20):

> Defendants contend that the all-rail routes and the routes in connection with the break-bulk water lines are more than sufficient to handle all available traffic and that, accordingly, the public interest does not require the establishment of additional through routes in connection with Seatrain. Unquestionably defendants have physical facilities sufficient to handle over the all-rail routes all available traffic, but all of the traffic does not so move, primarily because in many instances the all-rail rates are too high to permit of such movement. Undoubtedly the break-bulk lines could also handle all of the traffic now moving over all of the water routes, but that is not a sufficient reason for depriving Seatrain of an opportunity to participate in

the traffic under appropriate rates or for depriving the public of the admittedly superior service afforded by Seatrain.

All of these cases were decided by the Commission before Part III, including the "grandfather" clause, was enacted. It is submitted that they constitute a true and accurate picture of Seatrain's operations, the continuance of which after the "grandfather" date, would give Seatrain that "substantial parity" which the statute affords. *United States* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475; *Alton R. Co.* v. *United States*, 315 U. S. 15; *Crescent Express Lines, Inc.* v. *United States*, 320 U. S. 401.

Another case was decided by the Commission after the "grandfather" date. *Seatrain Lines, Inc.* v. *Akron, C. & Y. Ry. Co.*, 243 I. C. C. 199, decided December 23, 1940. The report in that case adds nothing of substance to what has already been quoted.

Summarized, these reports show that Seatrain's vessels can handle cargo in railroad cars only between ports at which special loading facilities have been provided, which, at that time, constituted only three ports, Hoboken, New Orleans and Havana; that Seatrain's vessels could not operate without loading devices that make possible the transfer of cars between the tracks on the vessels and the railroad tracks, or without the use of railroad cars, or without the cooperation of

the railroads at each of these terminals; that such vessels could not operate to any port not having a special type of equipment; that Seatrain's "method of operation is not the method used in operating any other ferry here or elsewhere in the world"; that none of the traffic transported by Seatrain can be handled without the intervention of the terminal switching lines; that, except for a small amount of liquid cargo, Seatrain cannot operate for the continuous carriage of freight in railroad cars without the cooperation of such connecting railroads; that Seatrain's method of transportation was developed for the purpose of eliminating the expense and delays incident to the transfer of lading between railroad freight cars and the holds of vessels; that Seatrain's service is superior to break-bulk steamer service and it can handle certain classes of freight not handled by other vessels.

This Court has noted that Seatrain's type of service "cannot be rendered without the privilege of carrying the very railroad cars which carry freight to its ports." *United States* v. *Pennsylvania R. R. Co.*, 323 U. S. 612, 617.[8]

Two consequences follow from the foregoing facts:

First. When Division 4 on July 2, 1942 author-

[8] See also *Interstate Commerce Commission* v. *Hoboken Manufacturers' R. R. Co.*, 320 U. S. 368, 371–372, where Seatrain's operations are described in considerable detail.

ized Seatrain to operate "as a common carrier by self-propelled vessels, in interstate or foreign commerce, in the transportation of commodities generally", it gave Seatrain something other than what it was doing prior to the "grandfather" date, as described in great detail in the reports and decisions cited. The record before the Commission, with those reports incorporated therein, shows conclusively that Seatrain never carried commodities generally—except in freight cars, which is a very different kind of traffic. Thus Division 4 went beyond the terms of the Act, since that permitted only a "continuance" of existing operations. The 1942 certificate was, therefore, in the language of Section 17 (7), *infra*, p. 69, "unwarranted."

Second. Seatrain can do everything under the amended certificate of February 6, 1945, which it ever did in the past; that certificate authorized operation "as a common carrier by self-propelled vessels, in interstate or foreign commerce, in the transportation of liquid cargoes in bulk; of empty railroad cars; and of property loaded in railroad cars received from and delivered to rail carriers and transported without transfer from railroad cars between the ports" presently in question.

The record shows that this is precisely the scope of Seatrain's past operations. To the extent that Seatrain claims a vested right in perpetuity in the erroneous certificate, it is in the position of

one who has mistakenly been given too much change by a merchant refusing to make restitution when the facts are made clear. But the authorities cited above, p. 27, show that it is the Commission's duty to see that operators are not given greater rights than they were entitled to on the "grandfather" date. Any other view would defeat the attainment of a fair and impartial regulation of the transportation system as a whole. Any other view, by allowing the original certificate to stand, by allowing "commodities generally" to include loaded freight cars and vice-versa, would not only permit Seatrain to go into the break-bulk steamship business but would also allow the break-bulk steamer lines to go into the Seatrain type of business, as appellee concedes. (R. 380.) The effect of such a course on the "fair and impartial regulation" prescribed by the Congressional declaration of a national transportation policy (Transportation Act of 1940), sec. 1, c. 722, 54 Stat. 898, 899, *infra*, p. 67), and on the command therein contained to "recognize and preserve the inherent advantages of each mode of transportation," will of course be readily apparent. If Seatrain's argument were sound, orderly regulation of commerce would come to an end.

Seatrain claims that, in addition to and apart from the goods which it handled in railroad cars, it carried "commodities generally" which moved from its own freight station without receiving a

prior or subsequent rail haul. But, in view of the fact that this traffic has to be loaded into freight cars, and shifted to or from the vessels at ports with rail facilities, it is believed that Seatrain can handle this type of traffic under the amended certificate. At any rate, it was admitted in the trial in the District Court that such traffic was not "substantial" (R. 189–190), and it is very doubtful whether, under this Court's decision in *United States* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475, 481, the statutory standards would be satisfied. In order for a carrier to be entitled to "commodities generally", such business must embrace "a wide variety of general commodities", or "a large group of commodities", or "a whole class or classes of property." *Id.*, at 483–484.[9]

The power of the Commission to determine whether a water carrier may transport commodities generally, or to specify what particular commodities may be transported, is not questioned, nor could it be; such a determination is to be made by the Commission upon the evidence before it.[10]

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[9] The Commission did grant authority to transport "liquid cargoes in bulk." Crude rubber was the only other commodity referred to by counsel in the lower court (R. 172).

[10] Commodity limitations, such as those involved in *United States* v. *Carolina Carriers Corp.*, 315 U. S. 475, are similar to those considered in *Noble* v. *United States*, 319 U. S. 88. But cf. *Crescent Express Lines* v. *United States*, 320 U. S. 401. Commodity limitations are applicable in the case of

It would appear that, since past operations to support "grandfather" rights are an historical fact, Seatrain could have supplied evidence in support of its claim if such evidence had been available. Its failure to do so, its unwillingness on two distinct occasions to present evidence before the Commission in support of the original certificate, is additional proof, if indeed additional proof were needed, that that certificate granted rights greater than those which could be proved.

We submit, therefore, that Seatrain under the corrected certificate can handle traffic at its own freight stations or lighterage from New York harbor, just as it always has, but such freight and such lighterage must be delivered to it in railroad cars in the future, just as they always have in the past; it can receive freight from other water carriers, motor carriers, or by wagon, but such freight must be loaded into freight cars so that the loading and unloading devices of Seatrain can be used; obviously, since the freight is in railroad cars, it cannot be delivered to any other carrier than a railroad; and there are terminal

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water carriers, notwithstanding the difference in wording with respect to "service" in section 208 (a) of the Act relating to motor carriers, and section 309 (d), relating to water carriers. With respect to those provisions, it would seem that a water carrier's right to "*add to*" its "service" undoubtedly does not authorize it to *change* the character of such service any more than a motor carrier's right to "add to" its "equipment and facilities" authorizes it to change the character thereof.

switching roads at Hoboken and New Orleans from which carriers it receives and delivers the freight. See p. 29, *supra*.

Finally, if in fact there can be doubt as to the scope of the corrected certificate, the proper procedure is not to set aside the entire carefully drawn report and order of the Commission, but rather to seek a clarification of its terms from the Commission. *Georgia Comm.* v. *United States*, 283 U. S. 765, 772.

(2) *The New York-Texas City Traffic*

As we have shown, the New York-Texas City service was inaugurated after the "grandfather" date between January 1, 1940, and February 1, 1941; consequently, Seatrain sought in respect thereof only a certificate authorizing continuance of this interim operation.

But, while the nature of the right was different and rested on different sections of the Act, the character of Seatrain's service was identical on both routes. The Commission originally granted only one certificate covering both operations (R. 52); Seatrain did not object then, and clearly does not object now, since it contends that its rights are governed by that certificate. Nor did Seatrain object to the amended certificate on the ground that it covered both operations. The objection went only to the Commission's power of modification.

Indeed, Seatrain could hardly contend that it should be given different operating rights over the New York-Texas City route as compared with the New York-New Orleans since it was known to the Commission, and generally, that Seatrain operated a particular type of vessel, which required a particular type of terminal facility, facilities which were available only at particular ports.

In the *Missouri Pacific* case, 245 I. C. C. 143, decided April 8, 1941, the Commission said (pp. 145, 148, 149):

> Early in the summer of 1939, Seatrain decided to inaugurate a service between Hoboken and Texas City, Tex., by adding two new vessels with one sailing each week in each direction. It also decided to establish a service between Texas City and Havana. The new service has since been established.
>
> * * * Seatrain has constructed loading and unloading facilities adjacent to the tracks of the Terminal [Texas City Terminal Ry. Co.] at Texas City, at the slip where its vessels are berthed, *similar to those at Hoboken and Belle Chasse.* The character and scope of the contractual or other arrangements between the Terminal and Seatrain are not shown of record.
>
> * * * * * * *
>
> * * * We conclude that there is no requirement that we find here that Sea-

train's service to and from Texas City is being operated in the public interest. That this service is required by the present or future public convenience and necessity must, however, be proved under section 309 of part III before Seatrain can obtain a certificate authorizing the continuance of this service.

* * * * * * * * *

The competitive situation resulting from Seatrain's operations between Texas City and Hoboken is, therefore, *substantially the same as found in the prior report to exist in connection with Seatrain's route between Belle Chasse and Hoboken.* [Italics added.]

It is clear, also, that Seatrain sought no different operating rights to Texas City than to New Orleans at the time it filed its application. The Morse affidavit of May 28, 1941, attached to the application, refers to the *Missouri Pacific Case,* quoted above, as proof of operations (R. 231).

Consequently, for the reasons stated in the discussion of the New York-New Orleans route, *supra,* pp. 27–39, when the Commission on reconsideration amended the original certificate to limit Seatrain's New York to Texas City traffic, that amendment conformed Seatrain's future authority to its earlier operations over that route.

B. THE COMMISSION HAD POWER TO MODIFY THE ORIGINAL CERTIFICATE IN VIEW OF ITS TERMS

The question presented, in view of the foregoing facts, is whether the Commission had power to correct its own mistake. We say that it had such power, particularly since the original certificate contained a reserved power in the Commission to alter its terms.

The original certificate issued to Seatrain read in part as follows (R. 52):

> *It is ordered,* That said carrier be, and it is hereby, authorized to perform the service specified above, subject, however, to such terms, conditions, and limitations as are now, or may hereafter be, attached to the exercise of such authority by this Commission.
>
> *It is further ordered,* That the holding of this certificate by said carrier be, and it is hereby, conditioned upon the exercise of the authority specified above, and upon compliance by said carrier with the requirements of the Interstate Commerce Act and the orders, rules, and regulations of the Commission thereunder.

This is the certificate which Seatrain now contends can not be modified by subsequent orders of the Commission under the Interstate Commerce Act in order to conform the authority thereby conferred to the facts of Seatrain's past operations. As we have shown, *supra,* p. 37,

Seatrain never carried commodities generally, except in the sense that such commodities may have been loaded in freight cars. Moreover, since the Commission had held in *Foss Launch & Tug Co. Applications,* 260 I. C. C. 103, that the designation "commodities generally" did not include loaded or empty freight cars, the certificate originally granted did not permit Seatrain to carry its characteristic cargo—loaded and empty freight cars—but did permit it to transport commodities in bulk, which it had never carried in the past. The certificate was, therefore, improperly issued, and not in compliance with the requirements of the Interstate Commerce Act. When the Commission thereafter modified the certificate, it did no more than to demand that "compliance by said carrier with the requirements of the Interstate Commerce Act and the orders, rules, and regulations of the Commission thereunder" with which the certificate itself conditioned Seatrain's exercise of the authority granted.

The inclusion in the certificate of a continuing power on the part of the Commission to limit or condition the authority granted was based on Section 309 (d) of the Act, which provides:

> Such certificate shall specify the route or routes over which, or the ports to and from which, such carrier is authorized to operate, and, at the time of issuance and from time to time thereafter, there shall be attached to the exercise of the privileges granted by

such certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require, including terms, conditions, and limitations as to the extension of the route or routes of the carrier, and such other terms and conditions, and limitations as are necessary to carry out, with respect to the operations of the carrier, the requirements of this part or those established by the Commission pursuant thereto: *Provided, however,* That no terms, conditions, or limitations shall restrict the right of the carrier to add to its equipment, facilities, or service within the scope of such certificate, as the development of the business and the demands of the public shall require, or the right of the carrier to extend its services over uncompleted portions of waterway projects now or hereafter authorized by Congress, over the completed portions of which it already operates, as soon as such uncompleted portions are open for navigation.

As the Commission said in its report on reconsideration (R. 33):

> If the Commission is without power to modify a certificate except where obtained by fraud or misrepresentation, then the proviso to the above section which prohibits the imposition, by such terms, conditions, or limitations, of restrictions upon the right of the carrier to add to its equipment, facilities, or service within the scope

> of the certificate as the development of the business and the demands of the public shall require, etc., would be meaningless.

And this Court has observed, in a related connection, that "Congress did not include authority to prescribe 'terms and conditions' merely as a preachment." *Gemsco, Inc.* v. *Walling*, 324 U. S. 244, 267.

Seatrain's attempt in the district court to minimize the effect of Section 309 (d) by restricting it to "conditions * * * as to the manner in which tariffs shall be published, as to the rendering of accounts, as to compliance with regulations for the transfer of a certificate * * *, and as to the making and filing of annual reports, contracts with other carriers, etc." is hardly convincing. The matters which appellee thus suggests as appropriate for inclusion as conditions in a certificate would be altogether out of place in a certificate specifying a carrier's operating authority. Indeed, they are specifically regulated elsewhere in separate sections of the Act. See Sections 306 (a), 306 (e), 312, 313 (a), 313 (b), 313 (c). One could as readily imagine the inclusion in a certificate of a condition relating to the rates to be charged by the carrier. While it might be beneficial to the public to authorize a water carrier to operate only upon condition that its rates be lower than rail rates by a certain amount, it seems

almost inconceivable that such a provision, or indeed any provisions relating to tariffs, accounts, reports, and the like should ever be incorporated as "conditions to a certificate" in the manner contemplated by appellee.

Obviously the statutory language regarding "terms, conditions, and limitations" is to be construed as being *in pari materia* with the other provisions of Section 309 relating to certificates, and hence as relating to the scope of operating authority granted by the Commission.

This view is supported by the construction which this Court in *Chicago, St. P., M. & O. Ry. Co.* v. *United States,* 322 U. S. 1, 4, placed on the analogous provisions in Part II of the Act; there it was held that Section 208 (a) empowered the Commission to require service to be furnished to points which the carrier did not seek authority to serve. No reason is perceived why the same language in Section 309 (d) should not be held broad enough to cover the modifications in service which the Commission ordered in this case.

The court below did not consider the foregoing case. Instead, it said that (R. 122):

> the "terms, conditions, and limitations" contemplated by Congress were of the kind that were before the Supreme Court in *Crescent Express Lines, Inc.* v. *United States,* 320 U. S. 401 and in *Noble* v. *United States,* 319 U. S. 88. The terms or conditions or limitations which may be imposed by the

> Commission under the authority of the section cited cannot sanction the radical step which the Commission has taken of transmuting a common carrier by water of commodities generally into a car-ferry.

But the cases cited by the district court are actually authorities against Seatrain. "Terms, conditions, and limitations" have been given just precisely such a broad meaning. In *Noble* v. *United States,* 319 U. S. 88, the Court upheld the action of the Commission in imposing restrictive provisions on a permit granted a motor carrier. The applicant, who had previously operated as a contract carrier of specified commodities for a particular type of shipper, was granted only a permit authorizing the continuance of such operations, and was denied authority to operate as a contract carrier of the same commodities for all shippers. And in *Crescent Express Lines* v. *United States,* 320 U. S. 401, the Commission was similarly upheld in limiting a motor carrier, which had previously operated only seven-passenger sedans but which had sought a bus permit, to the operation of sedans. What the Commission has done here is not different in substance; it has limited Seatrain to the carriage of the same kind of freight—loaded and empty freight cars, liquid cargoes in bulk—which Seatrain carried in the past. Here, as in the two cases cited by the court below, the "terms conditions, and limitations" were such as would maintain the "substantial parity between future

operations and prior *bona fide* operations" which the Act contemplated. *Alton R. Co.* v. *United States,* 315 U. S. 15, 22; *Noble* v. *United States,* 319 U. S. 88, 92. That being so, the changes ordered by the full Commission were within the rights reserved to it in the original certificate.

What Seatrain complains of is, in necessary substance, that the Commission amended the original certificate in conformity with its plain language. But even as an original proposition, even if the certificate first issued had been unconditional and without any reserved power to alter or amend, the Commission still "can at any time recall or amend its orders, and ought to do so whenever error appears" (R. 32).

This power is based on the following provisions contained in Section 315 of the Act:

> (c) The Commission may suspend, modify, or set aside its orders under this part upon such notice and in such manner as it shall deem proper.
>
> (d) Except as otherwise provided in this part, all orders of the Commission, other than orders for the payment of money, shall take effect within such reasonable time, not less than thirty days, as the Commission may prescribe and shall continue in force until its further order, or for a specified period of time, according as shall be prescribed in the order, unless the same shall be suspended, modified, or set aside by the Commission, or be suspended or set

aside by a court of competent jurisdiction.

(e) It shall be the duty of every water carrier, its agents and employees, to observe and comply with such orders so long as the same shall remain in effect.

And, as the Commission said (R. 32):

The foregoing provisions are similar to those contained in sections 15 (2) and 16 (6) of part I. The courts have consistently treated certificates of public convenience and necessity as orders. See *State of Colorado* v. *United States*, 271 U. S. 153; *Transit Comm.* v. *United States*, 289 U. S. 121; *Moffat Tunnel League* v. *United States*, 289 U. S. 113; *Pittsburgh & W. V. Ry. Co.* v. *United States*, 281 U. S. 479; *Claiborne-Annapolis Ferry Co.* v. *United States*, 285 U. S. 382. The certificate and order issued is an order within the meaning of section 315. Any decision made or order entered may be reopened at any time. *Douglas & Co.* v. *Chicago, R. I. & P. Ry. Co.*, 21 I. C. C. 541; *Creomulsion Co., Inc.* v. *Southern Ry. Co.*, 185 I. C. C. 724. The Commission has complete control over its orders. It can at any time recall or amend its orders, and ought to do so whenever error appears. *Loftus* v. *Pullman Co.*, 19 I. C. C. 102. *Traugott Schmidt & Sons* v. *Michigan Central R. Co.*, 23 I. C. C. 684. This right seems also to have been recognized by the Supreme Court in *Baldwin* v. *Milling Co.*, 307 U. S. 478, although action in conformity with our order had been

taken. We had entered an order directing the payment of reparation to a shipper. One of the defendants had paid the amounts so directed. Subsequently we reopened the proceedings and found the rates previously condemned not unreasonable and set aside our findings and orders including that on which reparation had been paid. The carrier then endeavored to secure refund to it of the amounts paid. The court in sustaining our action held that the carrier could maintain a suit to recover from the shipper.

The action of the Commission here in correcting its certificate is certainly far less drastic than that sanctioned in *Baldwin* v. *Milling Co.*, 307 U. S. 478.

Additionally, the Commission's power to modify its orders flows from Section 17 (7) of the Interstate Commerce Act, 49 U. S. C. 17 (7), as follows:

> If after rehearing, reargument, or reconsideration of a decision, order, or requirement of a division, an individual Commissioner, or board it shall appear that the original decision, order, or requirement is in any respect unjust or unwarranted, the Commission or appellate division may reverse, change, or modify the same accordingly. Any decision, order, or requirement made after rehearing, reargument, or reconsideration, reversing, changing, or modifying the original de-

> termination shall be subject to the same provisions with respect to rehearing, reargument, or reconsideration as an original order.

In view of this provision of law, which by Section 316 (a) is made applicable to Part III of the Interstate Commerce Act, it does not seem to us necessary to consider whether the action of Division 4 in issuing the original certificate was "by inadvertence" as the Commission found (R. 39), or whether it resulted from "the considered judgment of Division 4" (R. 125), as held by the district court. We pause only long enough to remark that we perceive no grounds on which the court was free to disregard the plain finding of the Commission, particularly since that finding related to the Commission's own mental processes and was concurred in by all the members of Division 4. Cf. *Baltimore & O. R. Co.* v. *United States,* 298 U. S. 349, 359. Moreover, the word "inadvertence" is, by common usage, broad enough to cover any mistake resulting from negligence.[11]

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[11] See the definition in Webster's New International Dictionary (2d unabridged ed. 1939):

"Inadvertence—1) The fact or action of being inadvertent [which in turn is defined as heedless, negligent, inattentive, as a negligent remark]; lack of heedfulness or attentiveness; inattention. 2) An effect of inattention; a result of carelessness; an oversight, mistake, or fault from negligence."

When Division 4 found that appellee was entitled to "a certificate authorizing continuance of the operations in which

In any event, and whatever the precise nature of the Commission's mistake, the original certificate was, by the plain language of Section 17 (7), subject to reconsideration, and, to the extent that it was thereafter found to be "unwarranted", subject to modification as well.

C. NO QUESTION OF REVOCATION IS INVOLVED

Much of the district court's opinion was taken up with demonstrating that, while the Commission had power to revoke the certificate of a motor carrier, it had no such power over the

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it was engaged on January 1, 1940" (R. 54) and then described Seatrain's vessels in which loaded and empty freight cars were transported on rails laid on the vessel, and liquid cargo in tanks (R. 54) obviously it was an "inadvertence" on the part of the Division to grant unrestricted rights in the certificate issued on July 2, 1942. (R. 52.) Especially would this appear so when the Division's report emphasized the savings in time and expense made because transfer of lading betw n vessels and freight cars was not required. (R. 55.)

As tending to dispel the "idea of inadvertence" (R. 169) counsel for Seatrain told the district court that the 1942 certificate "was precisely in the same form as all the certificates they were granting to everybody else" (R. 169). That Seatrain was not entitled to the same certificate "precisely" given to "everybody else" is apparent from counsel's prior statement made to the district court that "there is no other carrier like Seatrain in the whole coastwise or intercoastal trade." (R. 151.) Indeed, the Commission had stated in another decision, made a part of the record here, that Seatrain's "method of operation is not the method used in operating any other ferry here or elsewhere in the world." (P. 30, *supra*.)

certificates of water carriers, and, indeed, had indicated to Congress that it did not desire such power with respect to water carriers (R. 48). But that circumstance is not relevant to the present case. No question of revocation is involved here. The Commission does not seek to terminate respondent's rights. The order under review does not bar Seatrain from the high seas or from American territorial waters. All that it involves is a modification of a certificate to make it conform to the facts of Seatrain's operations.

Of course, in one sense, every restrictive modification is a revocation *pro tanto* of a privilege previously granted. On that view the only permissible modifications would be extensions of prior grants. It is true that no one has ever suggested that the Commission lacked power to broaden its certificates, and in practice this has frequently been done. Thus, authority for water carriers to serve additional territory, denied in the original certificates, has often been granted on reconsideration. *Union Barge Line Corp. Applications,* 260 I. C. C. 563; *Terrebonne Towing Co., Inc., Applications,* 260 I. C. C. 551; *Nicholson Universal Steamship Co. Applications,* 260 I. C. C. 393; *McWilliams Blue Line, Inc., Common Carrier Application,* 260 I. C. C. 673; *Schafer Bros. S. S. Lines Application,* 250 I. C. C. 353; *Marine Transport Lines, Inc.,*

Contract Carrier Application, 260 I. C. C. 620.[12] The character of commodities which may be carried has also been enlarged. *Sudden & Christenson Common Carrier Application*, 260 I. C. C. 643.[13] Other modifications expanding the authority previously granted water carriers have been made.[14]

As we say, this power to modify certificates by way of enlargement has never been questioned, and to the extent that under the rule of the *Foss* case the original certificate did not permit Seatrain to carry freight cars, the modification made here was an extension and so is admittedly within the Commission's power. It is only insofar as

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[12] And see, to the same effect, the following unreported decisions: W–33, *Shamrock Towing Co. Inc. Contract Carrier Application* (Aug. 25, 1945); W–306, *Calmar S. S. Corp. Common Carrier Application* (Nov. 27, 1945); W–398, *Parker Contract Carrier Application* (Apr. 1, 1944); W–496, *The Mirene Co. Applications* (Apr. 4, 1946); W–668, *Richmond Navigation Co. Common Carrier Application* (Aug. 18, 1945).

[13] To the same effect are W–420, *Knappton Towboat Co. Applications* (July 31, 1945); *Island Transportation Co. Common Carrier Application* (Nov. 29, 1945).

[14] W–498, *Hay Co. Contract Carrier Application* (May 19, 1945) (additional towage operating rights); *Baltimore Insular Line Inc. Contract Carrier Application* (Apr. 23, 1945) (restrictions on weight of commodities lifted; contract carrier certificate authorized in lieu of common carrier certificate); W–811, *Potomac River Line Common Carrier Application* (Aug. 16, 1943) (moonlight and Sunday afternoon excursions additionally authorized).

the modification made is restrictive that it is challenged—and challenged as being a revocation. Thus, on Seatrain's view, the only permissible modifications are those that have the effect of enlarging rights. It would be curious indeed if Congress intended that the Commission's power to modify should be thus artificially limited. We are convinced, for the reasons stated above, *supra*, pp. 52–54, that the power was not so limited, and certainly the Commission itself has on numerous other occasions modified prior certificates restrictively. See *Connors Marine Co., Inc., Contract Carrier Application*, 250 I. C. C. 717 (two certificates issued to separate applicants recalled and one certificate issued to both applicants to perform joint service); *Boudreaux Contract Carrier Application*, 260 I. C. C. 67 (amended certificate restricting applicant's territorial authority); W–103, *Hutton Contract Carrier Application* (Mar. 7, 1944) (restriction as to type of vessel which could be operated inserted in new certificate; old certificate recalled).

The modification involved in the instant case can in no fair sense be deemed a revocation. It does not deprive Seatrain of its right to operate; quite to the contrary, the amended certificate authorizes Seatrain to operate precisely as it has always operated in the past.

D. THE RESULT IS NOT DIFFERENT IF SEATRAIN'S RIGHTS BE DEEMED A FRANCHISE

We agree with the Court below that "Whether the certificate when issued be called a 'franchise' or not seems relatively unimportant" (R. 124), although, in view of Section 309 (e) of the Act, to the effect that "No certificate issued under this part shall confer any proprietary or exclusive right or rights in the use of public waterways", it would seem difficult to establish the proposition that a franchise had been issued. But to concede for purposes of argument that the original certificate was a franchise does not help Seatrain.

1. The original certificate was by its terms subject to future modification by the Commission. If it be deemed a franchise, then it was a variable franchise which the Commission has duly varied. To assert the contrary would seem to be equivalent to a contention that the doctrine of the *Dartmouth College* case precludes amendment of a corporate charter which was issued pursuant to a general incorporation act which included a reservation of the power to amend all charters thereafter issued.

2. We have pointed out above, *supra*, pp. 48–51, that the Commission has power under Sections 17 (7), 309(d), 315(c), and 315(d) of the Interstate Commerce Act to reconsider and modify its orders, certificates therein included. When there-

fore a certificate is issued pursuant to the Act, it would seem clear that it is subject to modification in accordance with the statutory provisions.

3. The doctrine that franchises are to be strictly construed in favor of the public right, see *Broad River Co.* v. *South Carolina*, 281 U. S. 537, 543; *Louisville Bridge Co.* v. *United States*, 242 U. S. 409, 417; *Water Co.* v. *Knoxville*, 200 U. S. 22, 33–34; *Pearsall* v. *Great Northern Ry. Co.*, 161 U. S. 646, 664, is amply broad enough to support the Commission's power of modification, particularly in view of the reservation in the original certificate.

In view of these considerations, it seems unnecessary to pursue the "franchise" question further, or to inquire whether *Frost* v. *Corporation Commission*, 278 U. S. 515, is still law today.

II. IN ANY EVENT, IT WAS ERROR FOR THE DISTRICT COURT TO SET ASIDE THE COMMISSION'S ORDER IN RELIANCE ON EVIDENCE WHICH SEATRAIN HAD REPEATEDLY DECLINED TO PRESENT TO THE COMMISSION

On the strength of the testimony of Seatrain's president, Graham Brush, testimony admitted over appellants' objection (R. 143; see also R. 131), the district court found that "Seatrain has made substantial expenditures and commitments in reliance upon the original certificate issued by the Commission," and that "Seatrain will incur large monetary losses" if the order issuing the

amended certificate goes into effect (Fdg. 16, R. 131). This finding the court below held, "supports the conclusion that the petitioner [Seatrain] will be deprived of property without compensation and without due process of law if the order of the Commission shall become effective" (R. 125).

The Commission found no basis in the record to support any contention with respect to commitments made on the strength of the original certificate (R. 36–37), a result which is hardly surprising in view of Seatrain's repeated refusals to present any evidence at the hearings. See pp. 9–12, *supra*. Introduction of such evidence might well have affected the result, as the Commission in its report specifically noted that its power to alter a certificate was one which would be exercised "sparingly" (R. 35), and that a certificate would not ordinarily be altered if vested rights had accrued on the strength thereof (R. 35).

The situation presented here, therefore, is as follows: Seatrain appears before the Commission denying that body's power to alter a certificate. It states, not once or casually, but advisedly on a number of occasions, that this is a pure question of law, a naked matter of power, and that therefore it will not introduce evidence. Defeated on the question of power before the Commission, Seatrain applies to the district court,

again alleging the Commission's lack of power to alter a certificate once issued. This time, however, Seatrain mends its hold: it alleges that the alteration of the certificate after expenditures had been made in reliance on its terms amounts to confiscation, and "would, if permitted to become effective and enforced, deprive plaintiff of property and take its property for public use without just compensation and without due process of law, in violation of the Fifth Amendment to the Constitution of the United States." (Petition, par. 50, R. 21.) On the strength of that generalized allegation,[18] Seatrain then offers the very evidence which it refused to present to the Commission; and the court receives the evidence and relies on it to set aside the Commission's order. In other words, on the precise issue of the Commission's power *vel non* to modify the original certificate, the court on one record decides that the Commission erred in the result which it reached on another record.

This was plain error. A long line of cases holds that, when administrative orders are sought to be set aside in the courts, evidence which was not before the administrative agency may not be

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[18] It may well be doubted whether the general allegations of confiscation contained in the petition were sufficient even to raise the issue. See *Louisville & Nashville R. R. Co.* v. *Garrett*, 231 U. S. 298, 315; *Aetna Ins. Co.* v. *Hyde*, 275 U. S. 440, 447; *Beaumont, S. L. & W. Ry.* v. *United States*, 282 U. S. 74, 86–89.

received. *National Broadcasting Co.* v. *United States,* 319 U. S. 190; *Shields* v. *Utah Idaho R. Co.,* 305 U. S. 177; *Acker* v. *United States,* 298 U. S. 426; *Tagg Bros.* v. *United States,* 280 U. S. 420; *United States* v. *Louisville & N. R. R. Co.,* 235 U. S. 314. Extracts from the opinions in these cases show the broad scope of the rule.

In *National Broadcasting Co.* v. *United States,* 319 U. S. 190, also brought under the Urgent Deficiencies Act, the Court said (319 U. S. at 227):

> A procedural point calls for just a word. The District Court, by granting the Government's motion for summary judgment, disposed of the case upon the pleadings and upon the record made before the Commission. The court below correctly held that its inquiry was limited to review of the evidence before the Commission. Trial *de novo* of the matters heard by the Commission and dealt with in its Report would have been improper. See *Tagg Bros.* v. *United States,* 280 U. S. 420; *Acker* v. *United States,* 298 U. S. 426.

In *Shields* v. *Utah Idaho R. Co.,* 305 U. S. 177, the Court said (305 U. S. at 185):

> The sole remaining question would be whether the Commission in arriving at its determination departed from the applicable rules of law and whether its finding had a basis in substantial evidence or was arbitrary and capricious. *Id.* That question

must be determined upon the evidence produced before the Commission.

And in *Tagg Bros.* v. *United States,* 280 U. S. 420, the Court, speaking through Mr. Justice Brandeis, stated the rule in the following terms (280 U. S. at 443–444):

> A proceeding under § 316 of the Packers and Stockyards Act is a judicial review, not a trial *de novo.* The validity of an order of the Secretary, like that of an order of the Interstate Commerce Commission, must be determined upon the record of the proceedings before him,—save as there may be an exception of issues presenting claims of constitutional right, a matter which need not be considered or decided now. *Louisville & Nashville R. R. Co.* v. *United States,* 245 U. S. 463, 466; compare *Liscio* v. *Campbell,* 34 F. (2d) 646, 647; and see *Prendergast* v. *New York Telephone Co.,* 262 U. S. 43, 50 and *Ohio Valley Water Co.* v. *Ben Avon Borough,* 253 U. S. 287, 289. On all other issues his findings must be accepted by the court as conclusive, if the evidence before him was legally sufficient to sustain them and there was no irregularity in the proceeding. To allow his findings to be attacked or supported in court by new evidence would substitute the court for the administrative tribunal as the rate making body. Where it is believed that the Secretary erred in his findings because important evidence was not brought to his attention,

> the appropriate remedy is to apply for a rehearing before him or to institute new proceedings. He has the power and the duty to modify his order, if new evidence warrants the change. Compare *Interstate Commerce Commission* v. *Union Pacific R. R. Co.*, 222 U. S. 541, 550. A rate order is not *res judicata*. Every rate order made may be superseded by another.

Baltimore & Ohio R. Co. v. *United States*, 298 U. S. 349, and *United States* v. *Idaho*, 298 U. S. 105, cited and relied upon by the district court, are not to the contrary.

In the *Idaho* case, the question turned on the authority of the Commission to order abandonment of a spur track wholly within the State of Idaho. This Court noted that "This suit is not one brought to set aside for error or irregularity an order of the Commission on a matter within its jurisdiction. * * * Here, the jurisdiction of that Commission was challenged." Pp. 109, 110. Consequently, since the question was one for judicial rather than administrative determination, see *Yonkers* v. *United States*, 320 U. S. 685, 689, new evidence was properly received. But here, in the *Seatrain* case, there is no question of the Commission's jurisdiction in the premises; the only question is whether, in view of the terms of the certificate and of the Act, the Commission could modify the authority originally granted.

Nor is the *Baltimore & Ohio* case, when properly analyzed, any more helpful to Seatrain, for while there the Court approved the action of the district court in receiving new evidence on the issue of confiscation, that approval was expressly predicated upon the Commission's refusal to receive that evidence. The Court noted that (298 U. S. at 363):

> Prior to the taking effect of the order, appellants filed a petition for rehearing in which they claimed that its enforcement would confiscate their property; they then make substantially the same contentions as they make in this suit and sought opportunity to support them by evidence in order to obtain the commission's findings of fact and decision upon the question of confiscation. But the commission denied their application.

Where, as here, an order of the Commission is attacked as being confiscatory in the constitutional sense, the contention can not first be advanced in the district court and there determined on the strength of evidence which was deliberately withheld from the Commission. The applicable rule is that laid down by this Court in *Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457, 489, 490:

> * * * correct practice requires that, in ordinary cases, and where the opportunity is open, all the pertinent evidence shall be submitted in the first instance to the Com-

> mission, and that a suit to set aside or annul its order shall be resorted to only where the Commission acts in disregard of the rights of the parties. * * * Hence, we cannot approve of the course that was pursued in this case, of withholding from the Commission essential portions of the evidence that is alleged to show the rate in question to be confiscatory.

Moreover, we believe that the doctrine that administrative remedies must first be exhausted before the courts are appealed to for relief, even when the issue is a constitutional one, see *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, disposes of the last vestiges of the notion that there can always be a trial *de novo* on constitutional issues. We read the *Myers* case as meaning that Seatrain here had no standing to raise the issue of confiscation in the district court since it did not raise that issue before the Commission, that in order to obtain review on the ground of confiscation it must first have argued to the Commission that the proposed modification of the certificate would have had that effect. But Seatrain neither argued confiscation to the Commission nor presented evidence. Consequently it did not exhaust its administrative remedies, so that the district court lacked jurisdiction to set aside the Commission's order on that ground.

We believe, also, that Seatrain's failure to produce evidence to the Commission amounts in

substance to an acquiescence on the facts, so as to bring this case within the scope of *United States* v. *Hancock Truck Lines*, 324 U. S. 774; there the Court held that it was improper for a district court to reverse an order of the Interstate Commerce Commission in respect of a provision therein as to which the suitor had advised the Commission that it no longer objected but acquiesced.

In any event, and whatever the scope of the *Myers* and *Hancock* doctrines here, Seatrain cannot, by recasting its assertion of the Commission's lack of power to modify a certificate in terms of unconstitutional confiscation, go on to support that assertion in the courts with testimony which it refused to present to the Commission. To permit it to do just this, as the district court did, would be to turn judicial review into a contest, into a species of shell game, an absorbing kind of legal legerdemain where the same question receives different answers before different tribunals as testimony which is withheld at one juncture is suddenly produced at another. Such a practice, sanctioned here by the district court, goes a long way towards unsettling the integrity of the administrative process. Cf. *United States* v. *Morgan*, 307 U. S. 183.

CONCLUSION

The judgment of the district court should be reversed, with directions to dismiss the petition.

Respectfully submitted.

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Interstate Commerce Commission.

OCTOBER 1946.

APPENDIX

The pertinent provisions of the Interstate Commerce Act are as follows:

[APPLICABLE TO ALL PARTS]

NATIONAL TRANSPORTATION POLICY

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy. (Sec. 1, Act of Sept. 18, 1940,

c. 722, 54 Stat. 898, 899; 49 U. S. C., notes preceding §§ 1, 301 and 901.

* * * * *

PART I

* * * * *

SEC. 17 (3). The Commission shall conduct its proceedings under any provision of law in such manner as will best conduce to the proper dispatch of business and to the ends of justice. The Commission shall have an official seal, which shall be judicially noticed. Any member of the Commission, the Secretary of the Commission, or any member of a board may administer oaths and affirmations and any member of the Commission or the Secretary of the Commission (or any member of a board in connection with the performance of any work, business, or functions referred under this section to a board upon which he serves) may sign subpenas. A majority of the Commission, of a division, or of a board shall constitute a quorum for the transaction of business. The Commission may, from time to time, make or amend such general rules or orders as may be requisite for the order and regulation of proceedings before it, or before any division, individual Commissioner, or board, including forms of notices and the service thereof, which shall conform, as nearly as may be, to those in use in the courts of the United States. Any party may appear before the Commission or any division, individual Commissioner, or board and be heard in person or by attorney. Every vote and official act of the Commission, or of any division, individual Commissioner, or board, shall be entered of record, and such record shall be made public upon

the request of any party interested. All hearings before the Commission, a division, individual Commissioner, or board shall be public upon the request of any party interested. No Commissioner or employee shall participate in any hearing or proceeding in which he shall have any pecuniary interest. (49 U. S. C. 17 (3).)

SEC. 17 (7). If after rehearing, reargument, or reconsideration of a decision, order, or requirement of a division, an individual Commissioner, or board it shall appear that the original decision, order, or requirement is in any respect unjust or unwarranted, the Commission or appellate division may reverse, change, or modify the same accordingly. Any decision, order, or requirement made after rehearing, reargument, or reconsideration, reversing, changing, or modifying the original determination shall be subject to the same provisions with respect to rehearing, reargument, or reconsideration as an original order. (49 U. S. C. 17 (7).)

SEC. 17 (9). When an application for rehearing, reargument, or reconsideration of any decision, order, or requirement of a division, an individual Commissioner, or a board with respect to any matter assigned or referred to him or it shall have been made and shall have been denied, or after rehearing, reargument, or reconsideration otherwise disposed of, by the Commission or an appellate division, a suit to enforce, enjoin, suspend, or set aside such decision, order, or requirement, in whole or in part, may be brought in a court of the United States under those provisions of law applicable in the case of suits to enforce, enjoin, suspend, or set aside orders of the

Commission, but not otherwise. (49 U. S. C. 17 (9).)

* * * * *

PART II

* * * * *

SEC. 212. (a) Certificates, permits, and licenses shall be effective from the date specified therein, and shall remain in effect until suspended or terminated as herein provided. Any such certificate, permit, or license may, upon application of the holder thereof, in the discretion of the Commission, be amended or revoked, in whole or in part, or may upon complaint, or on the Commission's own initiative, after notice and hearing, be suspended, changed, or revoked, in whole or in part, for willful failure to comply with any provision of this part, or with any lawful order, rule, or regulation of the Commission promulgated thereunder, or with any term, condition, or limitation of such certificate, permit, or license: *Provided, however,* That no such certificate, permit, or license shall be revoked (except upon application of the holder) unless the holder thereof willfully fails to comply, within a reasonable time, not less than thirty days, to be fixed by the Commission, with a lawful order of the Commission, made as provided in section 204 (c), commanding obedience to the provision of this part, or to the rule or regulation of the Commission thereunder, or to the term, condition, or limitation of such certificate, permit, or license, found by the Commission to have been violated by such holder: *And provided further,* That the right to engage in transportation in interstate or foreign commerce by virtue of

any certificate, permit, license, or any application filed pursuant to the provisions of section 206, 209, or 211, or by virtue of the second proviso of section 206 (a) or temporary authority under section 210a, may be suspended by the Commission, upon reasonable notice of not less than fifteen days to the carrier or broker, but without hearing or other proceedings, for failure to comply, and until compliance, with the provisions of section 211 (c), 217 (a), or 218 (a) or with any lawful order, rule, or regulation of the Commission promulgated thereunder.

(b) Except as provided in section 5, any certificate or permit may be transferred, pursuant to such rules and regulations as the Commission may prescribe. (49 U. S. C. 312.)

* * * * *

PART III

* * * * *

SEC. 309. (a) Except as otherwise provided in this section and section 311, no common carrier by water shall engage in transportation subject to this part unless it holds a certificate of public convenience and necessity issued by the Commission: *Provided, however,* That, subject to section 310, if any such carrier or a predecessor in interest was in bona fide operation as a common carrier by water on January 1, 1940, over the route or routes or between the ports with respect to which application is made and has so operated since that time (or, if engaged in furnishing seasonal service only, was in bona fide operation during the seasonal period, prior to or including such date, for opera-

tions of the character in question) except, in either event, as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission as provided in subsection (b) of this section and prior to the expiration of one hundred and twenty days after this section takes effect. Pending the determination of any such application, the continuance of such operation shall be lawful. If the application for such certificate is not made within one hundred and twenty days after this section takes effect, it shall be decided in accordance with the standards and procedure provided for in subsection (c), and such certificate shall be issued or denied accordingly. Any person, not included within the provisions of the foregoing proviso, who is engaged in transportation as a common carrier by water when this section takes effect may continue such operation for a period of one hundred and twenty days thereafter without a certificate, and, if application for such certificate is made to the Commission within such period, the continuance of such operation shall be lawful pending determination of such application.

* * * * *

(c) Subject to section 310, upon application as provided in this section the Commission shall issue a certificate to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if the Commis-

sion finds that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied.

(d) Such certificate shall specify the route or routes over which, or the ports to and from which, such carrier is authorized to operate, and, at the time of issuance and from time to time thereafter, there shall be attached to the exercise of the privileges granted by such certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require, including terms, conditions, and limitations as to the extension of the route or routes of the carrier, and such other terms, and conditions, and limitations as are necessary to carry out, with respect to the operations of the carrier, the requirements of this part or those established by the Commission pursuant thereto: *Provided, however,* That no terms, conditions, or limitations shall restrict the right of the carrier to add to its equipment, facilities, or service within the scope of such certificate, as the development of the business and the demands of the public shall require, or the right of the carrier to extend its services over uncompleted portions of waterway projects now or hereafter authorized by Congress, over the completed portions of which it already operates, as soon as such uncompleted portions are open for navigation.

(e) No certificate issued under this part shall confer any proprietary or exclusive right or rights in the use of public waterways. (49 U. S. C. 909.)

* * * * *

SEC. 315. (c) The Commission may suspend, modify, or set aside its orders under this part upon such notice and in such manner as it shall deem proper.

(d) Except as otherwise provided in this part, all orders of the Commission, other than orders for the payment of money, shall take effect within such reasonable time, not less than thirty days, as the Commission may prescribe and shall continue in force until its further order, or for a specified period of time, according as shall be prescribed in the order, unless the same shall be suspended, modified, or set aside by the Commission, or be suspended or set aside by a court of competent jurisdiction.

(e) It shall be the duty of every water carrier, its agents and employees, to observe and comply with such orders so long as the same shall remain in effect. (49 U. S. C. 915.)

SEC. 316. (a) The provisions of section 12 and section 17 of part I, and the Compulsory Testimony Act (27 Stat. 443), and the Immunity of Witnesses Act (34 Stat. 798; 32 Stat. 904, ch. 755, sec. 1), shall apply with full force and effect in the administration and enforcement of this part. (49 U. S. C. 916.)

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OCTOBER TERM, 1946

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v.

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF DELAWARE

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Despite the assurance of Seatrain's counsel to the Commission that "the first and really the major issue which is before you here, namely, whether a certificate once issued confers rights which are not thereafter revocable" (R. 374), and the statement of same counsel at the first hearing that Seatrain would not introduce any evidence because, if it did, the decision "would have to be one confirming the original order, and since that is so, it might be that you would decide on the evidence rather than the question of law, and we want to have the question of law squarely

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decided" (R. 332), much of Seatrain's brief in this Court is taken up with arguments as to the scope of the operations in which Seatrain can engage under the amended certificate. Under this Court's decision in *United States* v. *Hancock Truck Lines,* 324 U. S. 774, we think that the question of statutory authority for the Commission to alter the terms of an earlier erroneously issued certificate is the only question open.

None the less, there are a number of statements in appellee's brief which imperatively require correction, and it is those statements which have primarily moved us to file the present reply brief.

I. SEATRAIN NEVER HANDLED COMMODITIES GENERALLY EXCEPT SUCH AS WERE CARRIED IN RAILROAD CARS

Appellee states (Br. 4) that "Seatrain presented unchallenged proof from shippers of the need of additional steamship service out of Texas City and between Texas ports and the North Atlantic ports, and referred the Commission to evidence before it on the matter in another proceeding." As Seatrain did not introduce any evidence at two hearings called by the Commission for that purpose, the "proof from shippers" must be the letters and telegrams to the Maritime Commission (R. 293–323) protesting against discontinuing service by the two Seatrain vessels at Texas City, as that would leave the industries and shippers without necessary water service, "particularly the

types of vessel which does not require breaking bulk" (R. 293). Other shippers wrote they had been using Seatrain for "carload shipments" of cranberries (R. 293–294); for "one or two carloads on every sailing into Texas" (R. 296); another would require space for 15 to 30 carloads per trip to transport potash salts (R. 305); another directed attention to the fact that the vessels could handle 100 tank or box cars up and down the coast (R. 309), and another advised it had shipped "four cars carbon black per week regularly north-bound." (R. 310.) Crude rubber was heavily relied upon as a commodity handled "in any manner except in railroad cars" (Appellee's Br. 19). Yet we find Firestone Tire & Rubber Co., Akron, Ohio, advising the Maritime Commission that it had been "large users of Seatrain services in the handling of crude rubber between New York and the Gulf" and the Seatrain method of handling without breaking bulk had been of particular value to it (R. 311). Seatrain concedes (Br. 20) that this rubber was handled in railroad cars. The value of being able to handle other shipments without breaking bulk was constantly referred to in letters from other shippers. (R. 313; R. 314; R. 318; R. 319; R. 320; R. 321.)

Appellee sets forth (Br. 6–7) large commitments allegedly made in reliance on the original certificate. The record references given in support of these assertions all go to the testimony of Seatrain's president, Brush, introduced *de*

novo over appellants' objection in the District Court. Of course, none of such evidence was sought to be presented to the Commission at two hearings called for the purpose, and the Commission quite properly found that the record contains no specific showing in that respect. (R. 37.) The Brush affidavit (R. 76), prepared two days before the first hearing (R. 77), is far too general to support any claim of expenditures or commitments in reliance on the original certificate.

Seatrain admits (Br. 8) that it "appeared specially without offering evidence." At page 10 of its brief, Seatrain again refers to the fact that it introduced no evidence, but (p. 11) says that as the Seatrain is subject to the Commission's jurisdiction, the Commission "could have ordered Seatrain to submit additional data." It seems clear that Seatrain had adequate opportunity to present evidence to the Commission, and did not avail itself of the chance; in fact, its counsel frankly admitted at the argument before the Commission that "we have not presented proof, which we had an opportunity to do, I would say." (R. 391.)

Appellee refers (Br. 9, 15) to "bridge" traffic it claims as the only traffic it can handle under the corrected certificate, and refers to the testimony of witness Brush introduced in court in support of its claim that this constitutes "only 25% of the total" traffic. On cross-examination Mr. Brush admitted that practically all its

Hoboken-New Orleans traffic in the past was in cars (R. 189); and that in its Texas City service, based on 10 months actual operation, the traffic handled in other than cars "was not substantial for the ten-month period." (R. 190.)

In setting out the wording of the amended certificate, Seatrain (Br. 9) omits the words "between the ports of New York, N. Y., New Orleans, La., and Texas City, Tex., by way of the Atlantic Ocean and the Gulf of Mexico." (R. 22.) The Commission was here defining the rights of a water carrier, and was not concerned with the inland transportation of commodities. This Court has already held (see U. S. Br. 34) that Seatrain's type of service "cannot be rendered without the privilege of carrying the very railroad cars which carry freight to its ports." Seatrain admits (Br. 17) that "in the past Seatrain's traffic has been handled primarily in railroad cars but not always" and the record references given in support of "not always" is to "pressure vessels" so large that the railroads would not transport them. The right to transport "commodities generally" can hardly be supported by reference to this one commodity. *United States* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475, 481. The question goes to the weight of the evidence to be accorded by the Commission, not a matter for the court.

Appellee admits (Br. 15) it could handle bridge traffic under the new certificate; its port-to-in-

terior traffic and interior-to-port traffic (Br. 15) and its port-to-port traffic (Br. 16) which it claims it cannot handle under the amended certificate because not received from and delivered to railroads, is all traffic which we submit it can handle if loaded in railroad freight cars, and there are terminal railways at the three ports Seatrain serves, Hoboken, Belle Chasse and Texas City, to which traffic is delivered and from which it is received, namely the Hoboken Manufacturers Railroad Company, the New Orleans & Lower Coast Railroad Company, and the Texas City Terminal Railway Company. In order to avail itself of the special cradle and crane devices by which loaded freight cars are picked up and placed on standard gauge railroad tracks laid on the decks of the vessels, this traffic, if not already in cars, has to be loaded therein to make available Seatrain's facilities.

Seatrain refers (Br. 18) to its tariffs in support of service it renders to shippers, but this point is dealt with in the report of the entire Commission (R. 29), where the Commission said:

> * * * The mere fact that it participates in such tariffs does not establish that it handled freight by means other than in railroad cars. The contrary is indicated.

Seatrain concedes (Br. 21–22) that Seatrain vessels were primarily designed for use of railroad cars, but it claims (Br. 22) that it is a serious

misstatement for the government to assert as a fact (U. S. Br. 20) that Seatrain "never carried commodities generally." A reading of the whole sentence makes it clear, it is submitted, that what was meant was that Seatrain never carried commodities generally in other than railroad cars. The table referred to (R. 265–266) in support of Seatrain's contention that it handled commodities generally does not indicate that such traffic was handled in other than railroad cars; indeed the comments at the bottom of R. 266 would strongly indicate the contrary. Those comments indicate that in a three-month period of actual operation in 1941 in the Texas City service, 2,361 loaded cars were handled, an average of 91 loaded cars per voyage (R. 266). This obviously refers to all commodities handled, except fuel oil, for which authority is given in the amended certificate.

We submit, therefore, that the record fully sustains our conclusion that, except for liquids carried in tanks, Seatrain never carried commodities generally except in loaded cars which were not unloaded during carriage by Seatrain.

II. THE INTERSTATE COMMERCE ACT AUTHORIZES THE CONDITIONS WHICH THE COMMISSION INSERTED IN THE AMENDED CERTIFICATE

Seatrain notes (Br. 25) that Section 309 (d) of Part III of the Interstate Commerce Act omits the words "service to be rendered" contained in

Section 208 (a) of Part II, and argues therefrom that the Commission is imposing service limitations, which it has no authority to do.

In the first place, what the Commission is doing here, defining the proper position that Seatrain should occupy in the field of water transportation, can hardly be termed a service limitation; on the contrary it appears to us to go to the very heart of regulation. Secondly, Congress in Section 309 (d) of Part III added to the proviso of that section, the words "or service" so that the proviso reads: "*Provided, however,* That no terms, conditions, or limitations shall restrict the right of the carrier to add to its equipment, facilities, *or service* within the scope of such certificate, as the development of the business and the demands of the public shall require * * *." [Italics added.] The words "or service" do not appear in the similar proviso in Section 208 (a) of Part II. Applying the rule of *ejusdem generis* to the proviso in Section 309 (d), we submit that the right of a carrier to add to its equipment, facilities, or service within the scope of the certificate, can hardly be construed to mean that a carrier may engage in an entirely new business which it never had engaged in the past.

It should be noted, moreover, that all references at page 26 of Seatrain's brief are to be *de novo* testimony of witness Brush, not presented to the Commission, and received in the district court over our objection.

Seatrain asserts (Br. 28) that unlike the Motor Carrier Act, the Commission is given no power under the Water Carrier Act to revoke a certificate. Our position is simply what we have set out at length in our original brief (pp. 52–55), namely, that no question of revocation is here involved.

III. THE COMMISSION DID NOT CONFUSE THE TWO SEPARATE ROUTES INVOLVED IN THE PRESENT CASE

Seatrain argues (Br. 42 *et seq.*) that the Commission committed an error of law in confusing the "grandfather" application covering the New York-New Orleans operation with the extension or public convenience and necessity application covering the Texas City-New York operations. While the "grandfather" rights are covered by Section 309 (a), and the new operations by Section 309 (c), with different standards applied, the right of the Commission to issue both types of certificate is covered by one section, 309 (d). See U. S. Br. 73. When the original certificate issued by Division 4, to which rights Seatrain apparently now wants to be restored, there was no protest that the Commission had confused the issues. In fact, when the two applications were filed originally, Mr. Hodgson, an official of Seatrain, filed an affidavit with the Commission in which he stated that Seatrain's service between Texas

City and Hoboken is in practically all respects similar to its service between New Orleans and Hoboken, and the findings of the Commission as to public interest in connection with the latter are equally applicable in connection with the former (R. 288). Another official, Vice President Morse, filed an affidavit in support of the application and referred the Commission to a number of prior decisions which he asked the Commission to consider in reaching a conclusion on the application, and among those cases was the *Missouri Pacific Application Case,* 245 I. C. C. 143 (April 8, 1941) (R. 231), decided several months after the Texas City operations had commenced, wherein the Commission pointed out that Seatrain had constructed loading and unloading facilities adjacent to the tracks of the Texas City Terminal Railway Company at Texas City, similar to those at Hoboken and Belle Chasse; and that "The competitive situation resulting from Seatrain's operations between Texas City and Hoboken is, therefore, substantially the same as found in the prior report to exist in connection with Seatrain's route between Belle Chasse and Hoboken."

In the present case, both Division 4 and the full Commission discussed the New York-New Orleans and the New York-Texas City operations under separate chapters or headings (R. 54–56, first report; R. 28–31, report on reconsideration). In the last report, after such separate discussion,

there was a joint discussion as to the law to be applied and the questions presented (R. 31–38). Little would be gained by requiring the Commission to write two reports instead of one. The point has even less merit than a similar contention recently considered by this Court in *United States* v. *Pierce Auto Freight Lines*, 327 U. S. 515, 523, where it was found "not uncommon judicial practice to follow this course."

Seatrain (Br. 44–45) quotes from a statement made by its counsel to Commissioner Porter at the hearings in support of its claim that it objected to a combining of the two applications. It will be observed that counsel for Seatrain suggested that the two applications ought to be segregated for hearing, and the Commissioner advised "that ought to be easily handled" (R. 332–333). When the matter was called for hearing, Seatrain introduced no evidence. We have a right to assume that, if the matter had gone to hearing, the presiding Commissioner would have had his previous remarks in mind. The quotation referred to is weak foundation for any claim of error.

The alleged confusion of issues was not considered of sufficient moment to be dealt with by the court below, either in its decision (R. 119–126) or in its findings of fact and conclusions of law (R. 126–131). Appellee failed to take any cross appeal from the failure of the District Court so

to find, and of course the Commission and the Government did not assign the point as error (R. 135–138). The point has no more importance here than it was accorded by the District Court.

Respectfully submitted

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 959 61

THE UNITED STATES OF AMERICA, ET AL.,
Appellants,

vs.

SEATRAIN LINES, INC.,
Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF DELAWARE

MOTION TO DISMISS OR AFFIRM

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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF DELAWARE

Civil No. 579

SEATRAIN LINES, INC.,
Plaintiff-Appellee,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION
Defendants-Appellants.

MOTION OF SEATRAIN LINES, INC., TO DISMISS OR AFFIRM

Filed March —, 1946. Clerk, U. S. Dist. Court

Appellee, pursuant to Rule 12, paragraph 3, of the Rules of the Supreme Court of the United States, moves that the appeal be dismissed or in the alternative that the judgment of the District Court be affirmed.

This is an appeal from a judgment of a three-judge statutory court in the District of Delaware setting aside and annulling an order of the Interstate Commerce Commission cancelling a certificate issued to Seatrain Lines, Inc. authorizing it to operate between New York, New York, and New Orleans, Louisiana, and between New York, New York, and Texas City, Texas.

On July 2, 1942, the Commission granted to appellee, hereinafter sometimes for convenience referred to as Sea-

train, a certificate as a common carrier of commodities generally between the ports named. Two and one-half years later, after Seatrain had spent large sums in reliance upon the original certificate, the Commission cancelled the certificate and issued a new certificate which changed the status of Seatrain from that of common carrier of commodities generally to that of car ferry.

The lower court set aside and annulled the Commission's new order amending the certificate on the grounds that the Commission lacked statutory authority to revoke or cancel a certificate or to limit it in any substantial fashion and on the ground that Seatrain was deprived of property without compensation and without due process of law under the certificate as amended.

Motion to Dismiss or Affirm

Appellee moves that the appeal be dismissed or in the alternative that the judgment of the District Court be affirmed for the following reasons:

1. The Interstate Commerce Commission is without statutory power to revoke or cancel a certificate issued to a common carrier of commodities generally by water.

2. The Commission may not under the Fifth Amendment to the Federal Constitution, after having issued a certificate to such carrier, cancel or revoke it, or substantially withdraw the rights granted, after the grantee has acted upon it and spent large sums of money in reliance upon it.

Argument in Support of the Motion

I

The Interstate Commerce Commission is entirely without statutory jurisdiction to revoke a certificate issued to a common carrier of commodities generally by water.

Although express statutory power to revoke a certificate is contained in section 212(a) of Part II of the Interstate Commerce Act as to motor carriers (U. S. Code, Title 49, Section 312), and also in section 401(h) of Civil Aeronautics Act as to air carriers (U. S. Code, Title 49, Section 481), there is no corresponding provision in Part III of the Interstate Commerce Act. Not only that, but the Commission asked Congress not to give it that power. The Congress, which five years before (in 1935) had given the Commission power to revoke the certificates of motor carriers, was studying S. 2009, which later became the Water Carrier Act (Part III of Interstate Commerce Act) and sought the Commission's advice as to various aspects of the bill, including the matter of revocation of certificates. On January 29, 1940, a report was made to the Congress by Commissioner Eastman, Chairman of the Commission's legislative committee, which included the following paragraph:

> "House bill.—This bill leaves section 212(a) unchanged, and has no corresponding provision in the new part III. While there is room for argument, *we are inclined to believe that provision for the revocation or suspension of water carrier certificates or permits is not essential, if adequate penalty provisions are provided for violations of part III.* Revocation or suspension, in the case of motor carriers, is believed to be the most effective means of enforcement, since there are so many such carriers, and the operations of the great majority are so small, that enforcement through penal actions in courts presents many practical difficulties;

but this should not be true of water carriers." (Emphasis supplied.)

Appellants argue that "the second certificate is in reality broader than the original certificate for the reason that the latter did not give Seatrain the right to transport empty freight cars, which right the second certificate confers." The obvious fact is that whereas Seatrain was originally granted a broad certificate to operate as a common carrier of commodities generally between New York and New Orleans and between New York and Texas City, with no restrictions except as to geographical limitations, the new certificate, issued 2½ years later, revoked to such an extent the original grant that Seatrain can no longer receive traffic from its own shippers or deliver traffic to its own consignees or serve the freight stations named in its duly published tariffs or receive traffic from or deliver traffic to common carriers by motor vehicle or interchange traffic with other common carriers by water or receive traffic from lighters or deliver traffic to lighters or handle traffic in any manner other than in a railroad car. This almost unbelievable cancellation or withdrawal of rights originally granted results from the following language in the new certificate:

> "of property loaded in railroad cars received from and delivered to rail carriers and transported without transfer from railroad cars * * *."

Clearly under this wording Seatrain must confine its operations to pure car ferry or bridge service between railroads.

If it was the intent of the Commission to give Seatrain more rights than it had originally, the intent has not been carried out because the effect of the amended certificate is to change completely the status of Seatrain from a common carrier of commodities generally to a mere car ferry or bridge carrier.

The Commission claims that the right to revoke a certificate may be implied from section 315(c), Part III, Interstate Commerce Act, which deals with orders. The wording of the section is as follows:

> "(c) The Commission may suspend, modify, or set aside its orders under this part upon such notice and in such manner as it shall deem proper."

Clearly the foregoing paragraph relates to mere regulatory orders and not to certificates. In no part of the Act dealing with certificates are they referred to as orders. There is a vast legal distinction between a certificate and a regulatory order and since the power to revoke a certificate is expressly given in the Motor Carrier Act and in the Civil Aeronautics Act it should not be derived by implication in Part III where the power to revoke was withheld upon the recommendation of the Commission itself.

Nor can the Commission derive the power to revoke, as it seeks to do, from section 309(d) which authorizes it to attach reasonable terms, conditions and limitations *to the exercise of the privileges granted.* There is a vast difference between attaching reasonable conditions to the *exercise* of the rights and the revocation or substantial withdrawal of the rights themselves.

II

Certificate rights cannot be revoked or substantially withdrawn without violating the Fifth Amendment

During the period of 2½ years which elapsed between the granting of the original certificate and its cancellation appellee reacquired from the Government title to certain vessels, waiving its right to claim just compensation for the full value of the vessels and waiving its right to insist that the government recondition them. The worth of these

vessels was approximately $7,700,000 and the cost to Seatrain of reconditioning them for operation under the amended certificate would be $2,100,000. In addition, Seatrain purchased terminal properties in New York harbor at a cost of $200,000, and spent $140,000 a year to maintain its coastwise organization and facilities. The evidence shows that these monies would not have been spent if the amended certificate had been in effect.

Certificates are issued in perpetuity. They are the equivalent of perpetual franchises. When such a grant is accepted and acted upon by the grantee it becomes a contract with the government which cannot be revoked or repealed unless the power to repeal was clearly and unmistakably reserved. *Owensboro* v. *Cumberland Telephone Co.*, 230 U. S. 58; *Frost* v. *Corporation Commission*, 278 U. S. 515.

Prayer for Dismissal or Affirmance

It is clear from the foregoing that the Commission acted without statutory power. There is no longer any doubt under the decided cases that a certificate constitutes a contract between the holder and the government which may not be revoked unless the power to do so is expressly reserved. The judgment of the Court below should be affirmed and the appeal dismissed.

Definitive determination of the matter by affirming the judgment below is doubly necessary because, as the record shows, Seatrain has received notice of the return of its vessels requisitioned by the Government, and it knows not which way to turn until this issue is adjudicated. And, as the Court will appreciate, there is in the meantime a cloud on the certificates of all common carriers by water so long as the Commission can claim the authority to withdraw operating rights by revocation or cancellation, in

whole or in part, of certificates theretofore granted by it as if said certificates were mere regulatory orders.

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March 12, 1946.

(3783)

FILE COPY

NO. 61

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

UNITED STATES AND INTERSTATE COMMERCE COMMISSION,
Appellants,

v.

SEATRAIN LINES, INC.

Appeal from the District Court of the United States for the District of Delaware.

REPLY BRIEF ON BEHALF OF SEATRAIN LINES, INC., APPELLEE.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 61.

UNITED STATES AND INTERSTATE COMMERCE COMMISSION,
Appellants,

v.

SEATRAIN LINES, INC.

Appeal from the District Court of the United States for the District of Delaware.

REPLY BRIEF ON BEHALF OF SEATRAIN LINES, INC., APPELLEE.

I.

OPINIONS BELOW.

The opinion of the three-judge statutory court from which this appeal is taken is reported at 64 F. Supp. 156 and is included in the printed record at pp. 119-131. The challenged certificate of the Commission is set forth at pp. 22-23 of the printed record; the accompanying report of the Commission on reconsideration is reported as *Seatrain Lines, Inc., Common Carrier Applications*, 260 I. C. C. 430 and is reproduced at pp. 23-51 of the printed record. The original report of Division 4 is not reported but is reproduced in the printed record at pp. 53-56.

II.

JURISDICTION.

The final decree of the three-judge District Court was entered on February 7, 1946. (R. 132) The petition for appeal was presented and allowed on February 27, 1946. (R. 133-134) Probable jurisdiction was noted on April 22, 1946. (R. 433) The jurisdiction of this Court rests on the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 208, 219-221, 28 U. S. C. 45, 47a, and Section 238 of the Judicial Code, as amended by the Act of February 13, 1925.

III.

STATUTE INVOLVED.

The statute involved is Part III of the Interstate Commerce Act, particularly sections 309(a), (b), (c), (d) which are set forth in Appendix A to this brief.

IV.

QUESTIONS PRESENTED.

1. Whether the Interstate Commerce Commission has statutory authority, two and one-half years after granting a certificate to a common carrier by water for the transportation of commodities generally, to cancel such certificate and issue a "corrected" certificate in which it imposes new limitations, not as to the commodities carried or as to the ports served, but as to the service methods by which the common carrier may conduct its operations and as to the persons from whom it may receive freight and to whom it may deliver freight.

2. Whether a common carrier by water to which the Commission has issued a certificate as a common carrier of commodities generally, may prevent the Commission from cancelling the certificate and from imposing limitations which change the status of the carrier to that of car ferry, where it is shown that the carrier has spent large sums and made important commitments in reliance upon the original certificate.

3. Where a common carrier by water of commodities generally has received from the Commission a certificate under the "grandfather" clause authorizing it to continue its operations, including the receipt and delivery of traffic from its shippers and connecting lines by truck and by lighter at its own stations and terminals, does the Commission have statutory authority to cancel the certificate two and one-half years later and issue a "corrected" certificate imposing restrictions as to methods of service under which the carrier is precluded from reaching its own stations, from receiving freight from or delivering freight to its own shippers or connecting water and truck lines, and under which it is reduced to the status of railroad car ferry?

4. Where two different applications for certificates are filed, one for "grandfather" rights and one for future rights based only on public convenience and necessity, may the Commission, after having determined as to the latter that the public convenience and necessity require that the carrier receive a certificate as a common carrier of commodities generally, cancel the said certificate and issue a new certificate in which the criterion employed in measuring public need is the "grandfather" rights erroneously determined for another and different service?

5. Where a common carrier by water, confronted by the Commission with a proposed cancellation of its certificate and the substitution of a "corrected" certificate completely changing its status to its disadvantage and injury, and where it has warned the Commission that it has made substantial commitments and incurred substantial expense on the basis of the original certificate, and that the Commission lacks authority to take the action proposed, but the Commission nevertheless proceeds to cancel and "correct" the certificate, was it error on the part of the district court to receive evidence as to the acceptance by the carrier of and action taken and investments made by it in reliance upon the original certificate when such evidence had not been first presented to the Commission, although such evi-

dence was not directed to the regulatory or administrative issue within the Commission's jurisdiction?

V.

STATEMENT.

The statement of the case in appellants' brief does not clearly present the circumstances out of which the issues arose and the following statement is presented as a background for the argument of appellee's contentions.

Appellee, Seatrain Lines, Inc., commenced operation between New York harbor and New Orleans, La., via Havana, Cuba, in 1932. In May, 1940, it inaugurated service between New York harbor and Texas City, Tex. It operated these services continuously until its ships were requisitioned by the United States for war purposes in 1942.

Since Seatrain's Texas City service had not been started until May, 1940, Seatrain had no "grandfather" rights in this operation but was entitled to make application under the "interim" clause, which is the last sentence in Section 309(a), p. 76 *infra*. This it did in due season, praying the issuance to it of a certificate authorizing it to engage in transportation as a common carrier by water of commodities generally between New York harbor and Texas City. All competitors were notified but none objected or sought a public hearing. The Commission entered upon an investigation and through its field staff examined Seatrain's records and other matters. Seatrain was called upon to produce additional data which it did. Seatrain presented unchallenged proof from shippers of the need of additional steamship service out of Texas City and between Texas ports and the North Atlantic ports, and referred the Commission to evidence before it on the matter in another proceeding.

Seatrain's New York-New Orleans service had been in operation since 1932 so that it was entitled under the "grandfather" clause to have a certificate issued to it authorizing it to continue that service. It applied season-

ably for such a certificate, describing its operation as that of a "common carrier by water of commodities generally." Notice of this application was likewise served on competing water carriers and others and none made objection thereto. The Commission conducted an investigation examining Seatrain's records and other matters to confirm the fact and nature of the operations. The Commission's attention was again called by Seatrain to the evidence and to the Commission's own reports and findings in various proceedings wherein the Commission had been called upon to investigate and receive proof as to Seatrain's New York-New Orleans service.* Seatrain furnished the Commission with all additional data requested of it.

Since the application as to the New York-New Orleans service involved grandfather rights only, and since the application as to the New York-Texas City service involved no grandfather rights, but only the extent of public need for the service, Seatrain requested the Commission to keep the two applications separate and make them the subjects of separate reports and orders. This the Commission did not do and on July 2, 1942, it issued its report and order upon both applications through its Division 4 (R. 53-56). This admixture and confusion of the two applications operated to the disadvantage of Seatrain and to the denial of its rights, as hereinafter shown. (*Infra* p. 42)

As to the New York-New Orleans service, the Commission, by Division 4, found under the grandfather clause that Seatrain had been engaged in bona fide operation as "a common carrier by water of commodities generally" and was entitled to a certificate authorizing it to continue in such operation.

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* *Investigation of Seatrain Lines, Inc.*, 195 I. C. C. 215 (1933); 206 I. C. C. 328 (1935); *Seatrain Lines, Inc.* v. *Akron, Canton & Youngstown Railway Company, et al.*, 226 I. C. C. 7 (1938); 243 I. C. C. 199 (1940); 259 I. C. C. 297 (1944); *Hoboken Mfrs. R. Co.* v. *Akron, Canton & Youngstown Railway Company, et al.*, 234 I. C. C. 114 (1939); *Hoboken Manufacturers' Railroad Company* v. *Abilene & S. Ry. Co.*, 206 I. C. C. 328 (1935); 237 I. C. C. 97 (1940); 248 I. C. C. 109 (1941).

With respect to the New York-Texas City service, the Commission, by Division 4, found that the public convenience and necessity required Seatrain to engage in transportation between these ports as "a common carrier by water of commodities generally."

By its order dated July 2, 1942, the Commission issued a certificate to Seatrain (R. 52) authorizing it to continue in operation as a common carrier by self-propelled vessels "in the transportation of commodities generally between the ports of New York, N. Y., New Orleans, La., and Texas City, Tex., by way of the Atlantic Ocean and the Gulf of Mexico." The order was issued subject "to such terms, conditions, and limitations as are now, or may hereafter be, attached to the exercise of such authority by this Commission."

No objection to this order was made by any party. It was accepted by Seatrain and became effective according to its terms on August 10, 1942.

The order and certificate issued to Seatrain were in all respects similar to the certificates issued to other water carriers in the coastwise trade with which Seatrain was in competition (R. 198).* The Court will observe that neither in the certificate issued to Seatrain nor in the certificates issued to any of its competitors did the Commission define the type of ship to be operated or define the service methods by which the carrier might perform its transportation service, or specify the parties from whom it might receive and to whom it might deliver freight.

In reliance upon the original certificate Seatrain spent large sums of money and made important commitments. It acquired at Edgewater, N. J., valuable terminal property from the Colgate-Palmolive-Peet Company at a cost of over $200,000 (R. 181, 183). It also reacquired title from the government to four vessels, costing $7,700,000 (R. 176)

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* Similar certificates issued to Southern Steamship Company, The Bull Steamship Line, Pan-Atlantic Steamship Corporation, and Southern Pacific—"Morgan Line"—are set forth at pp. 352-364 of the printed record.

which had been requisitioned for title for war purposes and which had been so altered by the government as to make their commercial use impracticable without expenditures of $200,000 each for reconversion. Two of the vessels had been so altered for war purposes that it would cost approximately $800,000 each to re-alter them for the limited use required by the "corrected" certificate. (R. 178-9) In reacquiring these four vessels Seatrain agreed to relieve the government of any expense for reconditioning in excess of $200,000 each. (R. 177-180) In addition, Seatrain maintained two of its terminals at great expense, although they were not needed during the war, and continued and supplemented its tariffs in anticipation of resuming service, at a cost of over $140,000 a year for maintaining its facilities and tariffs (R. 180). The record shows affirmatively and without contradiction that these expenditures and commitments would not have been made if the original certificate were restricted and limited as the Commission has attempted to do (R. 179, 181). The new terminal property purchased at Edgewater, N. J., was obtained for the receipt and delivery of freight other than in cars, as it was especially suitable for the accommodation of lighterage and truck freight. (R. 182-183)

Moved by a change in policy resulting from its action on December 18, 1943, in another case involving a small water carrier operating on Puget Sound, *Foss Launch & Tug Co. Applications*, 260 I. C. C. 103, wherein the Commission held for the first time that the broad expression "common carrier by water of commodities generally" does not include transportation by car ferry, the Commission *on the same day* reopened the Seatrain application case for further consideration, giving the decision in the *Foss case* as the reason for such reopening (R. 56-57). Two weeks later the Assistant Director of the Commission's Bureau of Water Carriers addressed a letter to counsel for Seatrain suggesting that in view of the Foss decision Seatrain's certificate

should be amended to authorize Seatrain to engage in operation only

> "as a common carrier by the 'Seatrain' type of vessels, in interstate or foreign commerce, in the transportation of liquid cargoes in bulk; of empty railroad cars; and of property loaded in freight cars received from and delivered to rail carriers and transported without transfer from freight cars between the ports of New York, N. Y., New Orleans, La., and Texas City, Tex. . . . " (R. 59-60)

Having thus made up its mind that the Seatrain certificate should be re-examined in the light of the new policy in the *Foss case*, the Commission set the matter for hearing. (R. 68) Seatrain filed a motion to set aside the order of reopening on the ground that it was for a purpose beyond the Commission's power, the Commission having no power to revoke or cancel a certificate or any substantial part thereof (R. 69). Prior to the hearing and in support of its motion Seatrain filed an affidavit of Seatrain's president setting forth the action taken by Seatrain in reliance upon the original certificate and the expenses and obligations incurred by Seatrain which would be nullified and rendered worthless if the certificate were cancelled and limited as proposed (R. 76). The Commission, however, denied Seatrain's motion and proceeded with the hearing. At the hearing counsel for Seatrain renewed the motion, which was again denied, and appealed from Division 4 to the entire Commission. Seatrain also protested the hearing on the combined certificate and requested segregation. The motion was denied by the full Commission and the matter was again set for hearing. Because appellee conceived that the Commission was without authority to revoke the rights granted by the original certificate and that, therefore, the hearing was for purposes beyond the Commission's jurisdiction, and since the Commission did not ask it to supply additional data, Seatrain appeared specially without offering evidence.

Thereupon the Commission made the report and order of February 6, 1945, which are the subject of this suit (R. 22). This "corrected" order would revoke the original certificate and the rights granted to Seatrain thereby and would limit Seatrain, except for the transportation of liquid cargoes in bulk, to the transportation of empty railroad cars and

> "of property loaded in railroad cars received from and delivered to rail carriers and transported without transfer from railroad cars." (R. 22)

Seatrain contends that the "corrected" certificate goes far beyond the mere attaching of conditions to the *exercise* of the privileges granted in the original certificate and revokes such a substantial amount of the original grant as actually to change the status of Seatrain from that of a common carrier of commodities generally to that of mere car ferry operating as a bridge carrier only between railroads. Later in this brief (*Infra*, p. 58-59) it will be shown that, as the Commission has found, Seatrain has been an important carrier of rail-water, water-rail and port-to-port traffic, issued on its own bills of lading. Also, that it serves its own shippers and consignees and interchanges with other water carriers by lighter and truck.* Also, that it maintains its own terminals and freight stations in the Manhattan area.* Seatrain contends that under the "corrected" certificate it cannot continue to handle the above-mentioned categories of traffic because such freight is not interchanged with a railroad, nor is it interchanged in railroad cars. Hence it is impossible to handle such traffic "without transfer from railroad cars." Under the severe limitations of the "corrected" certificate Seatrain can handle only "bridge" traffic which comes from a railroad and is delivered to a railroad and handled in through service without transfer, this latter traffic constituting only 25 per cent of the total. (R. 188)

This was to be a test case to determine the extent of the Commission's power to prescribe the service methods by

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* Appellants' brief p. 38.

which common carriers by water shall conduct their operations. For this reason other common carriers by water, competitors of Seatrain, were permitted to intervene, it being their position that "there is involved the question as to the authority of the Commission to modify or revoke a certificate which has been granted and become effective, and the decision herein may become a precedent which will govern the Commission's decision with regard to other certificates." (Interventions of Ocean Steamship Company, Agwilines, Eastern Steamship Lines, and Bull Steamship Line, R. 347-350). Recognizing that it was a test case, Commissioner Porter said at the hearing in response to the statement of Seatrain's counsel that Seatrain's status at the hearing was that of guinea pig: "It seems to me we had just as well try it out with you as anybody I know of." (R. 333)

In making this a test case the object was to determine the right of the Commission to revoke the outstanding certificate of any carrier, and prescribe service methods to govern its operations. Since the Commission had abundant facts concerning Seatrain, including the decisions in prior Seatrain cases which the presiding Commissioner agreed were part of this record, and since the proposed action was regarded by Seatrain as being clearly beyond the power of the Commission, it introduced no evidence. Under the circumstances no new evidence was called for. Seatrain had supplied every bit of information which the Commission requested in connection with the original application and thereafter the Commission did not suggest, either in connection with the new hearing or otherwise, that it desired from Seatrain additional factual data. In fact, the proposed report and order were prepared and served *prior to hearing* and were based on the old record. (R. 60) The order of January 27, 1944, reopening the *Seatrain Certificate case* for hearing merely recited that "question has arisen" as to whether the rights granted to Seatrain "are not too broad" and that the question in issue at the hearing would be whether the certificate should be modified by im-

posing the service restrictions here in issue. (R. 68). Since Seatrain is a common carrier subject to the Commission's jurisdiction, the Commission could have ordered Seatrain to submit additional data. But it did not request it, nor did it need any additional data if the matter was to be determined upon the record already made.

Seatrain instituted this suit in the court below to set aside and annul the Commission's "corrected" order. The district court of three judges annulled the "corrected" order as prayed and the United States and the Commission have appealed to this Court.

SUMMARY OF ARGUMENT.

1. The "corrected" certificate represents an attempt by the Commission, two and one-half years after the original certificate was issued, to change completely the status of appellee by imposing limitations, not as to commodities carried or as to ports served, but as to the service methods by which appellee may conduct its common carrier operations. The result is to reduce appellee's status from that of common carrier of commodities generally to that of railroad car ferry, and to deprive Seatrain of three-fourths of its normal business.

2. The Commission not only has no statutory authority to revoke a certificate but expressly asked the Congress not to give it such power.

3. Under the "corrected" certificate appellee is given far less than its "grandfather" rights as to the New York-New Orleans service, with the result that it cannot receive traffic from its own shippers or deliver traffic to its own consignees, or serve its own freight stations, or receive traffic from lighters or trucks, or interchange freight in any way with other water lines, all of which things it did during the "grandfather" period.

4. The government's claim that the original certificate was inadvertently issued is contrary to "the facts of record." The Commission has admitted that it deliberately re-

opened the *Seatrain* case because of, and on the same day as, its decision in the *Foss* case, wherein it held for the first time that the expression "common carrier by water of commodities generally" is not sufficiently broad to include transportation by car ferry.* The reopening of the *Seatrain* case was due to this change in administrative policy, and not to inadvertence. The certificate originally issued was in complete harmony with the Commission's decisions in at least seven prior cases as to the status of Seatrain.

5. Even if there were inadvertence as to the grandfather rights covering the New York-New Orleans service, there could not have been inadvertence as to the New York-Texas City service, because the certificate as to the latter was based solely on public convenience and necessity, and there have been no findings made, and none could be made on this record, that the public convenience demands the severe restrictions and the drastically curtailed service here imposed.

6. Even if the Commission had correctly determined Seatrain's grandfather rights as to the New York-New Orleans service, which it did not do, it was error for the Commission to use said grandfather rights as the criterion for measuring the extent of the public convenience and necessity as to the New York-Texas City service, especially where no findings have been made, or could be made on the record, that the public convenience demands the severely restricted service authorized in the "corrected" certificate.

7. Whether or not a certificate is technically a franchise, it is similar to a franchise in that it is issued in perpetuity and confers important public rights and obligations, and the law is clear that such a grant cannot be revoked or substantially modified to the disadvantage of the grantee after substantial reliance thereon by the grantee, in the absence of fraud or non-use.

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* However, the Commission has held that Seatrain is not a car ferry. *Investigation of Seatrain Lines, Inc.*, 195 I. C. C. 215.

8. Where the Commission threatens, as it did here, to impose without statutory authority severe restrictions upon a certificate completely changing the status of a carrier, to its great injury, and where the carrier duly warns the Commission of its reliance upon the original certificate and duly moves for rescission of the action reopening the proceeding on the ground of the Commission's lack of power to take the proposed action under the statutes and under the Fifth Amendment, but the Commission proceeds nevertheless to take the action, the carrier is within its rights in showing to the Federal Court, in an injunction proceeding, how it would be injured by the action proposed by reason of large expenditures and important commitments made solely in reliance upon the original certificate.

9. The Commission's criticism of Seatrain for alleged failure to introduce new evidence at the hearings scheduled as a basis for cancelling its certificate and completely changing its status is manifestly unfair where it appears that the Commission called for no additional evidence and needed no additional evidence because its proposed action was based on alleged inadvertence in granting to Seatrain more rights than were justified by the record already made and by the Commission's findings in numerous previous cases.

10. It was not error of the court below to receive evidence as to Seatrain's acceptance of and of the investment made by it and action taken in reliance upon the original certificate when such evidence was not presented to the Commission. The evidence was not directed to any administrative question as to Seatrain's "grandfather" rights or as to the public interest and was therefore not proper evidence before the Commission and was relevant only in the injunction proceeding for the purposes thereof. Furthermore, the receipt of this evidence by the lower court did not render valid the "corrected" order of the Interstate Commerce Commission, so that that order was properly enjoined regardless of the receipt or rejection by the court of the evidence as to Seatrain's action in reliance thereon.

11. The government's emphasis on Seatrain's adaptability to the handling of freight in railroad cars gives a wrong perspective. Only about one-fourth of Seatrain's traffic is so-called "bridge traffic" moving through in cars without transfer. Under the "corrected" certificate Seatrain would be precluded from handling three-fourths of its traffic, including all of its lighterage, truck and local station traffic, none of which can be handled "without transfer." The government's emphasis on Seatrain's adaptability to the handling of freight in railroad cars gives the impression that the Commission is restricting Seatrain to the handling of freight in cars because it does not want Seatrain to enter the "break-bulk" business and thus destroy its own admitted efficiency. Seatrain handles most of its rail-water, water-rail and even port-to-port traffic in railroad cars, but it does not interchange with railroads at each end of its line traffic originating within the port area, or destined to the port area, or both, nor does it receive and deliver such freight in cars from shippers, consignees, and connecting water lines, nor does it handle such freight "without transfer from railroad cars." All of these things it would be prohibited from doing under the "corrected" certificate and three-fourths of its business would be taken away.

I.

ARGUMENT.

THE GOVERNMENT'S CLAIM THAT THE "CORRECTED" CERTIFICATE RESTORES APPELLEE TO ITS POSITION IN THE TRANSPORTATION SYSTEM IS NOT SUPPORTED BY THE RECORD.

Throughout the government brief appears the intimation, and at times the direct statement, that under the "corrected" certificate Seatrain could handle all of its normal business and that the purpose of the limitations is to "establish substantial parity between future operations and

prior bona fide operations." (Brief pp. 27 and 35) The first sentence in the government's "Summary of Argument" is that "Seatrain's operations were correctly reflected by the amended certificate and incorrectly reflected by the original certificate." (Brief, p. 19) But the record shows (R. 188) that Seatrain's "bridge" traffic, which is all that could be handled under the "corrected" certificate, constitutes less than 25 per cent of its total business.

At page 22 of the brief the government derives satisfaction from its claim that the Commission is not "barring Seatrain from the sea." But appellee submits that it threatens to do so because the record shows (R. 192) that Seatrain could not exist under the restrictions imposed.

The effect of the "corrected" certificate can be understood only by dividing Seatrain's traffic into categories and studying the effect of the "corrected" certificate on each category. This may be done as follows:

1. *"Bridge" traffic.* Seatrain handles through freight in cars with a rail haul at both ends of the water haul. This traffic Seatrain may continue to handle under the "corrected" certificate, but it constitutes less than 25 per cent of its entire traffic. (R. 188)

2. *Port-to-interior and interior-to-port traffic.* Seatrain handles a considerable volume of traffic originating, for example, in interior Louisiana and Texas, moving by rail to the ports of New Orleans and Texas City, thence via Seatrain's vessels to New York harbor for lighterage or truck delivery in New York harbor. The Commission admits that Seatrain is entitled to handle lighterage freight and truck freight. (Appellants' brief, p. 38) Included in this category is appellee's own station traffic received at or consigned to its two stations in the Manhattan area which are served only by truck. (R. 183) All of this traffic Seatrain would be precluded from handling because the "corrected" certificate specifies that it may receive traffic only from railroads and deliver traffic only to railroads and without transfer from railroad cars.

3. *Port-to-port traffic.* The Commission has found in one of the cases made part of this record that "most of Seatrain's coastwise traffic has been handled on what Seatrain claims to be a strictly port-to-port basis, namely, on local ships' bills of lading between Hoboken and New Orleans." *Investigation of Seatrain Lines, Inc.,* 195 I. C. C. 215 at page 224. Included in this port-to-port traffic is lighterage traffic which is not interchanged with railroads and which is very substantial in volume. *Hoboken Mfrs. R. Co.* v. *Akron, C. & Y. Ry. Co.,* 234 I. C. C. 114 at page 122. This local port-to-port traffic is handled on Seatrain's responsibility and, as stated, on its own bills of lading. None of it could be handled under the "corrected" certificate because the certificate limits Seatrain to traffic received from *and* delivered to railroads. This clearly means railroad participation at *both* ends of the water haul.

At page 38 of its brief the government suggests that such local traffic could be handled "just as it always has" in railroad cars. While it is true that most of this traffic has been handled in railroad cars because of physical limitations at Hoboken (R. 188, 190, 191), the important fact is that such traffic is neither received from nor delivered to a railroad and is in no sense railroad interchange freight even when, for Seatrain's convenience, it is transferred from lighters to cars rented by Seatrain at the Hoboken pier. (R. 40) That such lighterage traffic has not been interchanged with Hoboken Manufacturers Railroad, the only railroad with which Seatrain has had physical connection at New York, is conceded by the Commission, which has also found that the volume of such traffic is very heavy, constituting 478 cars in 10 months. (*Hoboken Manufacturers Railroad case,* 234 I. C. C. 114, 122.) In addition, this traffic could not be handled under the "corrected" certificate because it is physically impossible to handle lighterage traffic without transferring it between railroad cars and lighters. Seatrain has repeatedly challenged the government to show how such lighterage traffic can be handled without transfer

from railroad cars, but they have not answered the challenge except to say (p. 37 of their brief), with an obvious lack of confidence, that "*it is believed* that Seatrain can handle this type of traffic under the amended certificate." (Emphasis supplied) The following is from pages 36 and 37 of appellants' brief:

> "Seatrain claims that, in addition to and apart from the goods which it handled in railroad cars, it carried 'commodities generally' which moved from its own freight station without receiving a prior or subsequent rail haul. But, in view of the fact that this traffic has to be loaded into freight cars, and shifted to or from the vessels at ports with rail facilities, *it is believed* that Seatrain can handle this type of traffic under the amended certificate." (Emphasis supplied).

These categories of traffic which Seatrain would be precluded from handling under the "corrected" certificate constitute three-fourths of its total business (R. 188). Thus it will be seen not only that the status of Seatrain is completely changed from that of a common carrier of commodities generally to that of mere "bridge" carrier between railroads, but that it is deprived of three-fourths of its normal business.

Under these circumstances it is most unfair to give the impression that Seatrain could handle all the traffic it previously handled. In the past Seatrain's traffic has been handled primarily in railroad cars but not always. As to Texas City, although the service was comparatively new, the volume of large pressure vessels, boilers and the like which were handled other than in railroad cars was growing (R. 189 and 307), disputing the government's claim that Seatrain can and did handle traffic only in railroad cars. One of the objects of acquiring the Edgewater terminal was to enlarge and improve the handling of both lighterage and truck traffic to and from cars at Seatrain's terminal. (R. 182)

The record shows that Seatrain is under a legal obligation to serve its shippers, consignees and connecting water lines as well as its Manhattan station, all as shown in its tariffs. For example, the rates in its tariffs apply to and from its Manhattan station unless otherwise specified.* Item No. 2335 on page 111 of Seatrain Lines' Tariff I. C. C. No. 20, a comprehensive tariff of 190 pages in which are published local, joint and proportional rates on classes and commodities between the New York district, on the one hand, and the New Orleans district, on the other hand, contains the following item:

> "Except as noted in individual items, rates published herein to or from New York, N. Y., will apply to or from Manhattan Terminal (New York, N. Y.) of Seatrain Lines, Inc."

While under the limitations of the "corrected" certificate Seatrain is converted into a railroad car ferry and limited to service between railroads, the Commission has itself recognized that Seatrain is a common carrier of traffic between ports on its own bills of lading and that it serves other points within the port districts than the railroad docks. Thus in its original report in this case it said:

> "While the actual operation has been between docks at Hoboken and Belle Chasse, it has consisted of service to points which are within the ports of New York and New Orleans, respectively, and the operation should be authorized to and from these ports." (R. 54)

Here the Commission was at pains to point out that Seatrain is more than a "bridge" carrier, between two railroads, recognizing that it is a port-to-port carrier. It was because of these other services that the Commission held that Seatrain was not a car ferry. It was something more,

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* The Seatrain tariffs were received in evidence only for the purpose of showing the nature of the holding out. (R. 141-142) (These tariffs are a part of the record in this Court on appeal. They were not printed as a part of the transcript of record by special leave of Court.)

namely, a common carrier of commodities generally as distinguished from a car ferry.

Commissioner Lee points out in his dissenting opinion that Seatrain has been a local port-to-port carrier, and a participant in water-rail and rail-water traffic as well as a participant in business which involves a rail haul at both ends of the water haul. Indeed, he quotes the Commission's own language from *Hoboken Mfrs. Ry.* v. *Abilene & S. Ry. Co.*, 248 I. C. C. 109, as follows:

> "It seems appropriate here to point out that Seatrain contends, and the record indicates, that it transported various commodities in port-to-port service, on its own billing, which were not 'loaded in railroad cars received from and delivered to rail carriers and transported without transfer from railroad cars.' In Hoboken Mfrs. Ry. v. Abilene & S. Ry. Co., 248 I. C. C. 109, at page 113, we found that:
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> "'Moreover, the evidence shows that Seatrain does move a very substantial number of empty cars, routing them preferably by Havana in the hope that there they may pick up loads. It is also shown that a large volume of traffic via Seatrain originates or terminates at the ports, and that a supply of cars for traffic so originating is there maintained at Seatrain's expense.'
>
> "The reports of our investigation of Seatrain disclose that it leased cars from private car companies." (R. 44)

On page 18 of appellants' brief Seatrain is challenged to show from the record that crude rubber was handled in any manner except in railroad cars. On pages 265, 266 and 278 of the record appears a detailed list of the largest moving commodities in Seatrain's Texas City service for a three months period in 1941. Crude rubber appears, with 4533 tons shown. (R. 265) The important point is not whether the traffic is or is not handled in railroad cars. The point is that such traffic is transported by Seatrain without having been handled by any railroad or interchanged with any railroad at New York, as found by the Commission in *Hoboken*

Mfrs. R. Co. v. *Akron, C. & Y. Ry. Co.*, 234 I. C. C. 114. This rubber was necessarily handled in accordance with Seatrain's tariffs (Exhibit 2), the applicable tariff item reading as follows:

> "*Absorption of Lighterage Charge on Crude Rubber, Carloads*"
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> "On import shipments of CRUDE RUBBER in carloads, billed at through rates applicable from New York, N. Y., and delivered by lighter to piers of Seatrain Lines, Inc., in Hoboken, N. J., Seatrain Lines, Inc. will absorb lighterage charges of 2.7 cents per 100 pounds." (Supplement No. 2 to Seatrain Tariff I. C. C. No. 22, page 5, Item No. 81).

Seatrain's I. C. C. Tariff #39 shows that the rubber rates were applicable only to interior southern and southwestern points, such as Natchez, Mississippi and Memphis, Tennessee. This large and important tonnage was received by lighter from connecting water lines as provided in Seatrain's I. C. C. Tariff 20, Supplement No. 76, Item 2679. Seatrain concedes that every pound of this rubber was handled by it in railroad cars which were loaded by Seatrain on its docks at Hoboken from the lighters, which brought such freight from connecting water lines to the docks, the cost of lighterage being absorbed by Seatrain as provided in its Absorption Tariff. Obviously imported rubber is not received by Seatrain in a railroad car, nor could it be handled without transfer. It is not handled by any railroad or interchanged with any railroad at New York. The commodity which the government selected for use as a challenge turns out to be one of the principal commodities which the "corrected" order would prohibit Seatrain from carrying.

At page 38 of their brief appellants say:

> "We submit, therefore, that Seatrain under the corrected certificate can handle traffic at its own freight stations or lighterage from New York harbor, *just as it always has*, but such freight and such lighterage must

> be delivered to it in railroad cars in the future, *just as they always have in the past;* it can receive freight from other water carriers, motor carriers, or by wagon, but such freight must be loaded into freight cars so that the loading and unloading devices of Seatrain can be used; obviously, since the freight is in railroad cars, it cannot be delivered to any other carrier than a railroad; and there are terminal switching roads at Hoboken and New Orleans from which carriers it receives and delivers the freight. See p. 29, *supra.* (Emphasis supplied)

As an illustration of the arrangements which Seatrain has with steamship lines for the handling of commodities like imported crude rubber, reference is made to Seatrain's Tariff I. C. C. 20, Supplement No. 76,* Item 2679, on pages 5 and 8 covering agreements with other steamship lines, which provides that Seatrain's regular port-to-port rates named in this tariff are not applicable to such movements. This clause reads as follows:

> "Port-to-port rates named in this tariff will not apply on foreign commerce moving under agreements approved and on file with the Interstate Commerce Commission, as described below."

As above stated, the Commission has not only recognized that Seatrain's lighterage traffic is *not* interchanged with railroads, (234 I. C. C. 122) but the Commission refers to 478 carloads of such handled traffic in ten months (*ibid.*). None of this traffic could be handled under the "corrected" certificate for the same reasons that crude rubber could not be handled. At the risk of repetition, the important consideration is not the use of railroad cars, for which the Sea-

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*Pursuant to the Transportation Act of 1940 common carriers by water having arrangements with other steamship lines for through transportation were authorized to publish notice to that effect in their I. C. C. tariffs. Notice of the arrangements which plaintiff had was published and became effective on March 1, 1941. See, for example, page 8 of Supplement No. 122 to appellee's tariff I. C. C. No. 20.

train vessels were primarily designed, but the handling of freight *without transfer* and the exclusion of all shippers, consignees, connecting water carriers and connecting motor carriers by the requirement that the loaded cars must be received from and delivered to *railroads* at *both* ends of the water haul. There is no precedent in all the books for excluding a common carrier by water from receiving freight from its own shippers and delivering freight to its own consignees or from interchanging freight with other water carriers or motor carriers.

At page 20 of the government brief it is stated that Seatrain "never carried commodities generally." This is a serious misstatment of fact. It is contrary to the findings of record. Not only does the record show a widely diversified list of commodities handled by Seatrain (R. 265-6) but the Commission has not here sought to impose limitations at the commodity level. Even under the "corrected" certificate Seatrain could carry every commodity shown in its tariffs. The restriction is on the *method of carrying* and the *type of facilities used* and not on the *commodities*.

In a decision in 1935 the Commission said:

> "A large volume of diversified traffic moves between the Southwest and eastern-seaboard territory. Generally speaking, the distribution of this traffic between the all-rail and the break-bulk rail-water routes is determined largely by the measure of the respective rates."
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> * * * * * * * * *
>
> "In addition, certain classes of bulk freight which cannot be handled in vessels of the usual type, and which cannot bear the all-rail charges, can be handled by Seatrain, and thus markets opened up for them which theretofore could not be reached." (*Investigation of Seatrain Lines, Inc.*, 206 I. C. C. 328, 333, 335.)

II.

THE COMMISSION'S "CORRECTED" ORDER IS INVALID AS AN ATTEMPT TO DEFINE THE NATURE OF EQUIPMENT WHICH A WATER CARRIER MAY EMPLOY, THE METHOD OF HANDLING FREIGHT WHICH IT MAY USE, AND THE PARTIES WITH WHOM A COMMON CARRIER OF GENERAL COMMODITIES MAY INTERCHANGE FREIGHT, SINCE NO AUTHORITY TO DO THESE THINGS IS CONFERRED BY THE ACT.

Under the original certificate Seatrain was authorized, as were all competing carriers by water, to conduct its transportation service without restriction as to service methods. Shippers and carriers were free to decide what method was most efficient. The amended certificate here would restrict Seatrain to the handling of freight in railroad cars only, to the interchange of freight with railroads only at both ends of its line and to the handling of all freight without transfer from railroad cars.

Congress refrained from giving the Interstate Commerce Commission jurisdiction over the *service* methods of water carriers, although five years earlier it had expressly given the Commission jurisdiction over the service methods of motor carriers. Section 208 of the Motor Carrier Act gives the Commission jurisdiction to specify the type of service to be rendered by motor carriers, but the corresponding provision (Sec. 309(d)) of the Water Carrier Act confers no such jurisdiction. So striking is the difference in this respect between two otherwise similar statutes that we quote them:

As to Motor Carriers

"Sec. 208. *(Added August 9, 1935) U. S. Code, title 49, sec. 308* (*a*) Any certificate issued under section 206 or 207 shall specify *the service to be rendered* and the routes over which, the fixed termini, if any, between which, and the intermediate and off-route points, if

any, at which, and in case of operations not over specified routes or between fixed termini, the territory within which, the motor carrier is authorized to operate; and there shall, at the time of issuance and from time to time thereafter, be attached to the exercise of the privileges granted by the certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require, including terms, conditions, and limitations as to the extension of the route or routes of the carrier, and such terms and conditions as are necessary to carry out, with respect to the operations of the carrier, the requirements established by the Commission under section 204 (a) (1) and (6): *Provided, however*, That no terms, conditions, or limitations shall restrict the right of the carrier to add to his or its equipment and facilities over the routes, between the termini, or within the territory specified in the certificate, as the development of the business and the demands of the public shall require." (Emphasis supplied).

As to Water Carriers

"309 (d) Such certificate shall specify the route or routes over which, or the ports to and from which, such carrier is authorized to operate, and, at the time of issuance and from time to time thereafter, there shall be attached to the exercise of the privileges granted by such certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require, including terms, conditions, and limitations as to the extension of the route or routes of the carrier, and such other terms, and conditions, and limitations as are necessary to carry out, with respect to the operations of the carrier, the requirements of this part or those established by the Commission pursuant thereto: *Provided, however*, That no terms, conditions, or limitations shall restrict the right of the carrier to add to its equipment, facilities, *or service* within the scope of such certificate, as the development of the business and the demands of the public shall require. . ." (Emphasis supplied)

Attention is called to the italicized words "*the service*" to be rendered in Section 208 and their *omission* from the same clause in Section 309 (d). Not only does Part III give the Commission no jurisdiction over the service methods of common carriers by water but the provision in Sec. 309 (d) is an express prohibition against attaching any terms, conditions or limitations which restrict the right of water carriers to add to their equipment, facilities *or service* within the scope of their certificates, whereas the corresponding proviso in the Motor Carrier Act, while prohibiting the Commission from restricting a motor carrier to add to its equipment or facilities, does not prohibit the Commission from imposing limitations as to *service*. In spite of this clear distinction between the two statutes, the Commission has here undertaken to impose upon Seatrain restrictions relating to the *service* methods of conducting its common carrier operations, thus appropriating to itself jurisdiction which Congress was most careful to avoid giving it.

There is no doubt about the Commission's right to prescribe service methods for motor carriers. The leading case is *Crescent Express Lines* v. *United States*, 320 U. S. 401 (1943), where the Commission held, and was sustained by this Court, that a motor carrier could not use a larger vehicle than a six-passenger sedan. Under the circumstances the government's reliance on the *Crescent case*, a motor carrier case, is especially significant. No similar ruling may be made as to water carriers because the statute withholds from the Commission power regarding the service methods of water carriers.

The decision of this Court in *Chicago, St. P., M. & O. Ry. Co.* v. *United States*, 322 U. S. 1, 4, relied upon at page 46 of appellants' brief, is by no means inconsistent with this view. There it was held, as to motor carrier operation, that the Commission might require the motor carrier to extend its routes beyond the scope of its application. Requiring a motor carrier at the time a certificate is issued to extend its

routes is hardly in the same category as specifying how a water carrier shall conduct its operations.

The statement on page 47 of appellants' brief that the Commission has "limited Seatrain to the same kind of freight" is incorrect. No limitation has been imposed as to the kind of freight. Seatrain can carry any commodity named in its voluminous tariffs. *The limitation relates to service methods* and to the persons from whom Seatrain may *receive freight and to whom it may deliver freight.*

Appellee stresses the important fact that its method of handling lighterage and truck freight at Hoboken has been unsatisfactory because of cramped and inadequate facilities. The very purpose of acquiring new property at Edgewater was to add to the facilities so as to enable Seatrain "to handle freight to and from the lighter". (R. 182) For lighters at Hoboken, Seatrain "only had two berths and they were very congested berths on a very narrow pier". (Ibid.) It became necessary for Seatrain to acquire more ample and more adequate terminal facilities at Edgewater so that the lighterage and truck freight could be more efficiently and expeditiously handled. (*ibid.*) The space around the new warehouse at Edgewater is "ideal for the receipt and delivery from the trucks", (R. 182) and one of the objects of acquiring the new terminal was to enable traffic to be warehoused, coopered, weighed, counted, etc., which cannot be done, of course, if the traffic must be handled "without transfer". "The entire Colgate property is quite useless to us under this corrected certificate and I can't see how it is possible for us to use it". (R. 182-183)

These additional facilities which would permit improved methods of handling at Edgewater are precisely the type of facilities and equipment which Congress must have had in mind when it provided in Section 309(d) that "no terms, conditions, or limitations shall restrict the right of the carrier to add to its equipment, facilities, or service within the scope of such certificate, as the development of the business and the demands of the public shall require. . . ." Seatrain acquired at Edgewater expensive additional facilities and

added to its equipment in order to give the service that the public demanded and the Commission has imposed restrictions which render useless such additional facilities and equipment, thus depriving the public of that which Congress sought to give. It would be difficult to visualize a more flagrant departure from the express prohibition in the statute.

The failure of Congress to vest in the Commission jurisdiction over the service methods of common carriers by water does not represent a departure from established policy. The Commission has never had jurisdiction over the service methods of railroads, except in periods of car shortage or other emergencies. Section 1(15) of Part I.

This matter is of extreme importance to the water carriers. Their service methods must be elastic. Vessel types are not constant, nor are terminal facilities. The possibility of handling truck trailers on vessels has had recent consideration in *Savage Application*, 260 I. C. C. 603. It is the declared policy of Congress to foster and develop a merchant marine, and it is the desire of Congress that the merchant marine shall be as efficient as possible. The preamble to the Interstate Commerce Act provides that "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation . . . . to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers . . ." Common carriers by water were to be given great latitude as to their methods of conducting business and adapting their service to the needs of commerce. It was clearly contemplated, as shown by the proviso in section 309(d), that they were to be free to employ new inventions at will; that they were to be encouraged to improve their methods of receiving and delivering freight, and to devise radically new methods of handling and stowing freight on board their ships. This freedom the Commission would deny to water carriers while leaving the railroads free to employ any service methods they please.

The domestic merchant marine would be greatly impaired if water carriers could not determine the service methods most suitable to their shippers and consignees. What may happen if the Commission interferes with these matters and enters the field of managerial discretion is shown by the effect of the "corrected" certificate on Seatrain's new facilities at Edgewater, which, as above stated, would be rendered totally useless if the action of the Commission here is sustained. (R. 182-3)

III.

THE COMMISSION WAS AND IS WITHOUT STATUTORY AUTHORITY TO REVOKE OR SUBSTANTIALLY WITHDRAW THE CERTIFICATE RIGHTS OF A COMMON CARRIER BY WATER.

The court below correctly described the principal issue in this case as "the authority of the Commission to alter drastically its original certificate." The court concluded that "there is no statutory authority for the revocation or alteration of the certificate."

The following is from the record in the court below:

> "Biggs, J. Let us reduce it even more narrowly. Let us assume, arguendo, that they had not acted on it (the certificate), that they had merely received it. Treat it from your angle. Where does the Commission get the power to revoke it?
>
> "Mr. Dumbauld. As I say, there are no decisions I know of on the point." (R. 200)

Unlike the Motor Carrier Act (Part II of the Interstate Commerce Act) and unlike the Civil Aeronautics Act (Title 49, U. S. C. Secs. 401-681), the Commission is given no power under the Water Carrier Act (1940), (Part III of the Interstate Commerce Act) to revoke the certificate rights granted to common carriers by water. Not only that, but the Interstate Commerce Commission asked Congress *not* to give it the power of revocation as to common carriers by water.

Not often does legislative history speak so positively as it speaks here as to the Commission's absolute lack of power to revoke. The Congress, which five years before (1935) had given the Commission power to revoke the certificates of motor carriers, was studying S. 2009, which later became the Water Carrier Act (Part III of the Interstate Commerce Act), and sought the Commission's advice as to various aspects of the bill, including the matter of power to revoke certificates. On January 29, 1940, a report was made to the Congress by Commissioner Eastman, chairman of the Commission's Legislative Committee, on behalf of the Commission, which included the following paragraph:

> "House bill. This bill leaves section 212(a) unchanged and has no corresponding provision in the new part III. While there is room for argument, *we are inclined to believe that provision for the revocation or suspension of water carrier certificates or permits is not essential, if adequate penalty provisions are provided for violations of part III.* Revocation or suspension, in the case of motor carriers, is believed to be the most effective means of enforcement, since there are so many such carriers, and the operations of the great majority are so small, that enforcement through penal actions in courts presents many practical difficulties, but this is not true of water carriers." (R. 123-124) (Emphasis supplied.)

Congress took the Commission's advice and withheld the power to revoke, although the power to revoke the certificates of motor carriers had been expressly given to the Commission only five years before in the Motor Carrier Act. Section 212(a) of that Act (Part II of the Interstate Commerce Act), provides that any motor carrier certificate may "be suspended, changed, or revoked, in whole or in part, for willful failure to comply with any provision of this part, or with any lawful order, rule, or regulation of the Commission . . ."*

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* Section 212(a) of Part II is set forth in Appendix B to this brief.

In like manner the Civil Aeronautics Act, section 401(h), provides that the Civil Aeronautics Authority may, after hearing, "alter, amend, modify, or suspend any such certificate, in whole or in part, . . . or may revoke any such certificate, in whole or in part, for intentional failure to comply with any provision of this title or any order, rule, or regulation" etc. The Civil Aeronautics Act was enacted June 23, 1938, two years before Part III of the Interstate Commerce Act.

It is highly significant that Congress, five years after it had expressly vested in the Commission power to revoke motor carrier certificates, and two years after it had vested in the Civil Aeronautics Authority power to revoke the certificates of air carriers, enacted Part III of the Interstate Commerce Act applicable to common carriers by water without a single word about revoking, canceling or suspending such certificates. And it is of course doubly significant that this failure to follow the pattern of the Motor Carrier Act and the Civil Aeronautics Act followed representations to the Congress by the Interstate Commerce Commission to the effect that inclusion of provisions for revocation or suspension of water carrier certificates was not essential if adequate penalty provisions were provided for violating Part III. (Heavy penalties for violation of any provision of the Water Carrier Act or of any rule, regulation, requirement or order thereunder, or any term or condition of any certificate or permit are provided in section 317 of Part III).

So important is the power to revoke the certificate of a common carrier that it is unthinkable that the power can be derived by implication. A certificate constitutes the franchise of a common carrier by water and represents its right to live. To revoke the certificate is to destroy the franchise and to destroy the right to live. And we are dealing here with a part of the American merchant marine which it is the policy of Congress to foster and preserve. The Court will doubtless take judicial notice of the large capital in-

estment required for steamship lines operating in the oastwise trade. Such investment would be discouraged if he Interstate Commerce Commission had power to revoke ranchise rights, or to withdraw a substantial part of them. t would be well-nigh impossible to induce investors to spend millions of dollars in a steamship venture if the basic franchise on which the whole operation rested could be substantially withdrawn or impaired after reliance upon it. The situation as to steamship lines in this respect differs materially from the situation as to motor carriers which are very numerous and which have comparatively small investments. Commissioner Eastman, in his statement to the Congressional committee, stressed the large number of motor carriers, most of which are small. It is one thing to revoke the certificate of a motor carrier which owns two or three trucks with a ready resale value; it is quite another thing to revoke the certificate of a water carrier which has investments in large and specially designed steamships and in terminal facilities in the New York district and in Texas and Louisiana. Congress was well aware of these differences when it granted the power to revoke as to motor carriers but withheld it as to water carriers. And the Commission was also well aware of the difference when it recommended to Congress that the same power which had been vested in it as to motor carriers be withheld as to water carriers.

The leading case, among the decisions of the Commission, on the question of revocation of a certificate is *Smith Bros. Revocation of Certificate*, 33 MCC 465, decided in 1942. While that is a motor carrier case it is of significance here because of certain principles which the Commission recognized in its decision. The Commission says at page 472 of the decision:

> "In our opinion, the language of the foregoing section is clear and definite and unmistakably shows that Congress intended that a certificate, once effective, may be terminated by us only on the conditions and accord-

ing to the procedure, therein specifically provided. We may issue decision upon decision, and order upon order, on an application for a certificate so long as sufficient reason therefor appears and until all controversy is determined, but once a certificate, duly and regularly issued, becomes effective, our authority to terminate it is expressly marked off and limited. All the antecedent decisions and orders are essentially procedural in character, and may be set aside, modified, or vacated, but the certificate marks the end of the proceeding, just as the entry of a final judgment or decree marks the end of a court proceeding. To hold that under section 208 (a) we have the power to include in certificates self-executing forfeiture terms, conditions, or limitations would make section 212 (a) merely surplusage and would wipe out the stability and certainty with respect to operating rights of common carriers by motor vehicle required in the public interest and contemplated by the Act."

The above decision is doubly significant because the Motor Carrier Act expressly gives the Commission power to revoke a certificate, whereas, as we have seen, no such power is given in Part III of the Act. If the Commission's authority to revoke a motor carrier certificate is "expressly marked off and limited" what is to be said of its authority to revoke the certificates of water carriers as to which the statute confers no power of revocation whatever?

Likewise in *Quaker City Bus Co.—Purchase—Blackhawk Line, Inc.*, 38 MCC 603, the Commission said at page 606:

> "The existence of a certificate creates a vested motor-carrier status which stays in force and effect for the life of the certificate. After issuance of a certificate the holder thereof must be accorded the opportunity of complying with all the terms of the certificate before the vested right can be revoked."

The government argued, to the evident surprise of the court below, that the Commission has more power to revoke or alter a certificate where the statute is silent on the point than where the power to revoke is expressly given. (R. 202)

The government relies on *Connors Marine Co., Inc. Contract Carrier Application*, 250 I. C. C. 717, as authority for the proposition that it may withdraw a certificate grant. It appears that in this case two corporations applied for certificate rights, one as a contract carrier and one as a common carrier. They had common officers and directors, and the Commission granted common carrier rights to both of them in order to avoid the difficulty of vesting dual rights in two corporations so closely intertwined. Upon reconsideration the Commission decided that they should follow the rule of this Court in *United States v. N. E. Rosenblum Truck Lines, Inc.*, 315 U. S. 50, wherein this Court frowned upon multiple rights on the basis of a single transportation service. The two certificates were withdrawn and a single certificate issued covering both corporations. There is no corresponding issue here, nor is there any evidence that in the case cited the rights vested.

Similarly in *Boudreaux Contract Carrier Application*, 260 I. C. C. 67, the Commission found Boudreaux entitled to operate as a common carrier by towing vessels and issued a certificate. Upon protest and reconsideration the Commission imposed a new geographical limitation in a modified certificate. There was neither a showing that the rights had become vested nor any objection to the issuance of the modified certificate. Indeed, the applicant stated to the Commission that he was too ill to undergo the physical strain incident to a hearing and to avoid the ordeal stated that he was willing to forgo his claim to any rights taken away by the new geographical limitation imposed.

Again, in W-103, *Hutton Contract Carrier Application*, (I. C. C., Mar. 7, 1944), Division 4 found that applicant was entitled to a common carrier certificate for operation in New York harbor and on the New York State barge canal and Niagara River. The proceeding was reopened on the Commission's own motion, and the certificate was modified to restrict Hutton to towing operations. Apparently applicant was willing to have his rights restricted to his old basis of

operation, because there is no indication that he protested or challenged the Commission's action. However that may be, the Hutton case was a grandfather case, whereas the present case, as to the New York-Texas City operation, involves the determination of public convenience and necessity for the future.

The government relies also upon *Baldwin* v. *Milling Co.*, 307 U. S. 478, which held that where the Commission awards reparation to a shipper and later modifies its order, as it has statutory power to do, the money must be refunded. There is, of course, no vested right in money erroneously paid. But this is a far different matter from the withdrawal of franchise rights which have become vested after reliance upon them.

IV.

A CERTIFICATE ISSUED TO A COMMON CARRIER OF COMMODITIES GENERALLY BY WATER IS ANALOGOUS TO A FRANCHISE.

It is not necessary for the purposes of this case to determine that a certificate issued to a common carrier of commodities generally by water is literally a franchise. It suffices that such a certificate has many of the indicia of an ordinary franchise. This matter has an important bearing on the right of the Commission to withdraw a substantial part of the original grant after substantial reliance thereon by the grantee.

The courts have been at pains to distinguish between permits or licenses, which are temporary, and franchises, which are perpetual. A franchise is public in nature, usually involving important public rights and obligations, while a license is personal and temporary. One may have a license to operate a dance hall, or to take fish from certain waters, or to sell liquor, or to practice law. Such licenses are usually temporary or revocable and do not include the taking or use of public property or involve the right of eminent domain. In quite a different category are the franchises of

public utilities, such as telephone companies, gas companies, water companies, and common carriers.

In *Trustees of Southampton* v. *Jessup*, 162 N. Y. 122, cited with approval in *Owensboro* v. *Cumberland Telephone Co.*, 230 U. S. 58, the court said at pages 126 and 127:

> "A license is a personal, revocable and nonassignable privilege given by writing or parol to one, without interest in the lands of another, to do one or more acts of a temporary nature upon such lands. (*Greenwood Lake etc. R. R. Co.* v. *N. Y. & Greenwood Lake R. R. Co.* 134 N. Y. 435, 440, and cases cited.) 'Although originally revocable at the will of the licensor, it may become irrevocable through the expenditure of money by the licensee' (Id.)
>
> * * * *
>
> "A franchise is a grant by or under the authority of government, conferring a special and usually a permanent right to do an act, or a series of acts, of public concern, and, when accepted, it becomes a contract and is irrevocable, unless the right to revoke is expressly reserved. (*People ex rel. Atty.-Genl.* v. *Utica Ins. Co.*, 15 Johns. 357, 387; *Bank of Augusta* v. *Earle*, 13 Pet. 519, 595; *California* v. *Pacific R. R. Co.*, 127 U. S. 1, 40.) These definitions, while not comprehensive enough to cover all cases, are sufficient for the case in hand.
>
> "The right in question is not a license, because it is neither temporary nor personal, as the drawbridge and roadway authorized are substantial, fixed and permanent improvements, for the benefit of defendant's lands, and assignable therewith."

Even a cotton gin can be of such a public nature that its right to operate is in the nature of a franchise. In *Frost* v. *Corporation Commission*, 278 U. S. 515 (1928) this Court considered an Oklahoma statute which declared that cotton gins are public utilities and that no one may operate a cotton gin without first securing a permit from the State Corporation Commission. In holding that such a permit is a franchise, the Court said:

"It follows that the right to operate a gin and to collect tolls therefor, as provided by the Oklahoma Statute, is not a mere license, but a franchise, granted by the State in consideration of the performance of a public service; and as such it constitutes a property right within the protection of the 14th Amendment. See *Walla Walla* v. *Walla Walla Water Co.*, 172 U. S. 1, 9; *California* v. *Pacific Railroad Co.*, 127 U. S. 1, 40-41; *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 328, 329; *Owensboro* v. *Cumberland Teleph. & Teleg. Co.*, 230 U. S. 58, 64-66; *Boise Water Co.* v. *Boise City*, 230 U. S. 84, 90-91; *McPhee & McGinnity Co.* v. *Union Pac. R. Co.*, 148 Fed. 5, 10-11.

"In *California* v. *Pacific Railroad Co.*, 127 U. S. 40-41, a franchise is defined as a 'right, privilege or power of public concern, which ought not to be exercised by private individuals at their mere will and pleasure, but should be reserved for public control and administration, either by the government directly, or by public agents, acting under such conditions and regulations as the government may impose in the public interest, and for the public security . . . No private person can establish a public highway, or a public ferry, or railroad, or charge tolls for the use of the same, without authority from the legislature, direct or derived. These are franchises . . . . The list might be continued indefinitely.'

"Specifically, the foregoing authorities establish that the right to supply gas or water to a municipality and its inhabitants, the right to carry on the business of a telephone system, to operate a railroad, a street railway, city waterworks or gas works, to build a bridge, operate a ferry, and to collect tolls therefor, are franchises. And these are but illustrations of a more comprehensive list, from which it is difficult, upon any conceivable ground, to exclude a cotton gin, declared by statute to be a public utility engaged in a public business, the operation of which is precluded without a permit from a state government agency, and which is subject to the same authority as that exercised over transportation and transmission companies in respect of rates, charges and regulations. Under these conditions, to engage in the business is not a matter of common right, but a privilege, the exercise of which, except

in virtue of a public grant, would be in derogation of the state's power. Such a privilege, by every legitimate test, is a franchise."

As Commissioner Lee points out in his able dissent (R. 40), in the absence of a fixed term of life, or of an express reservation of the right of revocation, a franchise obtained without fraud or misrepresentation is perpetual and irrevocable except possibly for nonexercise or nonuser. Commissioner Lee cites *Owensboro* v. *Cumberland Telephone Co.*, 230 U. S. 58, and *New York Electric Lines* v. *Empire City Subway*, 235 U. S. 179 and cases there cited.

In the *Owensboro case* it appears that the city by ordinance granted to a telephone company the right to place and maintain poles and wires on the city streets. After the company had operated for a quarter of a century the city council got the idea that it would like to obtain some revenue from the telephone company, so it passed another ordinance requiring that the poles and wires be removed from the streets or that the telephone company, in the alternative, pay a substantial sum to the city for its right to continue in operation. The city relied strongly, as the government does here, on a reservation in the granting ordinance to the effect that the ordinance might be altered or amended as the necessities of the city might demand. This Court held, however, that even such a reservation could not be relied upon to impair substantially the value of the franchise. Mr. Justice Lurton, speaking for the Court said:

"A license has been generally defined as a mere personal privilege to do acts upon the land of the licensor, of a temporary character, and revocable at the will of the latter unless, according to some authorities, in the meantime expenditures contemplated by the licensor when the license was given have been made. See *Greenwood Lake & P. J. R. Co.* v. *New York & G. L. R. Co.*, 134 N. Y. 435, 440; *Southampton* v. *Jessup*, 162 N. Y. 122, 126.

"That the grant in the present case was not a mere license is evident from the fact that it was upon its face neither personal nor for a temporary purpose. The right conferred came from the state through delegated power to the city. The grantee was clothed with the franchise to be a corporation and to conduct a public business, which required the use of the streets, that it might have access to the people it was to serve. Its charges were subject to regulation by law and it was subject to all the police power of the city."

The Court emphasized the necessity of viewing as permanent the rights granted under franchises, saying (p. 66):

"If there be authority to make the grant, and it contains no limitation or qualification as to duration, the plainest principles of justice and right demand that it shall not be cut down, in the absence of some controlling principle of public policy. This conclusion finds support from a consideration of the public and permanent character of the business such companies conduct and the large investment which is generally contemplated. If the grant be accepted and the contemplated expenditure made, the right cannot be destroyed by legislative enactment or city ordinance based upon legislative power, without violating the prohibitions placed in the Constitution for the protection of property rights. To quote from a most weighty writer upon municipal corporations, in approving of the decision in *People* v. *O'Brien*, 111 N. Y. 1, 42, a decision accepted and approved by this court in *Detroit* v. *Detroit Street Railway*, 184 U. S. 368—'The grant to the Railway Company may or may not have been improvident on the part of the municipality, but having been made and the rights of innocent investors and of third parties as creditors and otherwise having intervened, it would have been a denial of justice to have refused to give effect to the franchise according to its tenor and import, when fairly construed, particularly when the construction adopted by the court was in accord with the general understanding. In the absence of language expressly limiting the estate or right of the company, we think the court correctly held, under the legislation and facts, that the right created by the grant of the franchise was perpetual, and not for a limited term only.'"

In *New York Elec. Lines Co.* v. *Empire City Subway Co.*, 235 U. S. 179, the Court held, Mr. Justice Hughes writing the opinion, that there is "a tacit condition annexed to grants of franchise that they may be lost by misuser or non-user." The Court cites with apparent approval the *Owensboro case* and other cases holding that a franchise gives the grantee a perpetual and indefeasible interest, and it also quotes with approval a statement in *Louisville* v. *Cumberland Telephone and Telegraph Co.*, 224 U. S. 649, 659, to the effect that "Such a street franchise has been called by various names—an incorporeal hereditament, an interest in land, an easement, a right of way—but howsoever designated, it is property."* Yet the Court in the subway case concludes that a franchise may be revoked for non-user on the ground that reasonable exercise of the rights and privileges granted is an implied condition of every grant, as is also the condition that the grant shall have been obtained without fraud or misrepresentation. See also *Levisa River Railroad Company Construction*, 257 I. C. C. 203 (1944), where a certificate to a railroad company was revoked 15 years after it had been issued because "The evidence . . . establishes that the Levisa company had no immediate intention of resuming construction of its line, and, had the Norfolk and Western application not been filed, probably would not have resumed construction prior to the expiration date of its certificate. It still has no definite prospects for the movement of traffic." Apparently on the ground that this was sufficiently close to non-exercise of the rights to justify revocation and also on the ground that there was misrepresentation in securing the certificate, it was revoked.

In *Thunder Bay Limestone Co.* v. *D. & M. Ry. Co.*, 294 Fed. 958 (D. C. Mich.), the court, with regard to a railroad

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* Compare the language of the court below: "The inviolability of the certificate is clear whether it be considered a purely statutory creation or to be of the nature of a franchise." (Footnote 11 to the decision) (R. 124)

holder of a certificate of convenience and necessity, said (p. 962):

> "It has vested rights in and under such certificate of public convenience and necessity."

Thus it appears well established that there is no power to repeal or modify franchise rights without the consent of the holder when the right is not expressly reserved even though the grantor, on later reflection, may come to regard the original grant of the franchise as improvident or the result of the exercise of poor judgment. *Owensboro* v. *Cumberland Telephone Co.*, 230 U. S. 58, 66.

A certificate issued to a common carrier by water under Part III has many of the earmarks of the ordinary public utility franchise. It is a grant by the government to a private person; it confers valuable rights; it is clearly distinguishable from a mere license; it relates to a public matter; it casts upon the grantee important obligations; it runs in perpetuity. And, just as an ordinary franchise cannot be revoked unless the right to revoke is expressly reserved, so a certificate cannot be revoked unless statutory provision is made for revocation.

There was here a substantial revocation as distinguished from the mere attaching of conditions to the exercise of the privileges, for under the limitations of the "corrected" certificate appellee could handle only its "bridge" traffic, representing less than one-fourth of its normal business.

At page 25 of their brief appellants attempt to belittle a certificate by referring to a statutory limitation to the effect that no certificate "shall confer any proprietary or exclusive right . . . in the use of public waterways." But this very exception indicates that franchise rights were authorized; otherwise this express limitation would not have been necessary.

V.

SEATRAIN SPENT LARGE SUMS IN RELIANCE UPON THE ORIGINAL GRANT.

The record shows that Seatrain, acting in reliance upon the original certificate, made important commitments and spent large sums of money. It acquired from the Colgate-Palmolive-Peet Company at Edgewater, N. J., property, including a four-story building suitable for a freight station and warehouse, at a cost of $200,000, this property adjoining the main yards of the Susquehanna Railroad. (R. 181, 183).

In addition the Texas City Terminal, not needed for wartime operation, has been maintained at a cost of over $30,000 annually. (R. 180) Other costs of maintaining the organization have brought the total to over $140,000 a year to maintain the coastwise organization and facilities. (R. 180)

Seatrain also reacquired from the government four vessels having an original cost of $7,700,000 and claim for just compensation was waived. (R. 176). Instead of fulfilling its obligation to return the vessels in the same condition (they had been altered for war use, two of them extensively) the Government agreed to allow Seatrain $200,000 per vessel for reconversion for commercial use but it would cost Seatrain $800,000 each to re-alter two of the vessels so that they could function under the restrictive terms of the "corrected" certificate. (R. 178)

> "Judge Biggs: You embarked on this because you had the original certificate?
>
> "Mr. Brush: That is right, sir, and we never conceived that the Commission had the power or would try to tell anybody how to conduct its operation." (R. 179).

The total loss to Seatrain caused by the "corrected" certificate would be $2,100,000, "which is two-thirds the entire capital which I raised to put into this Company. Now we

can't stand that loss, and as a result . . . those two ships have been offered for sale . . ." (R. 180).

The record shows that these expenditures and commitments would not have been made except in reliance on the original certificate. (R. 181)

The following is from the record in the court below:

> "Mr. Dumbauld: If you were to restrict your future operations to the moving of cars and the shipping of cars from rail to Seatrain boats and back again to rail, would you need the additional facilities?
>
> "Mr. Brush: No, we would not need the facilities we formerly had.
>
> "Mr. Dumbauld: Why not?
>
> "Mr. Brush: Because there is not enough of that traffic.
>
> "Mr. Dumbauld: I see.
>
> "Mr. Brush: All the other facilities like your freight house, lighterage berths, and pier where we receive and deliver goods and interchange with trucks, you would not need any of those." (R. 188)

What Mr. Brush meant was that the new terminal would be quite useless under the "corrected" certificate because only "bridge" traffic could be handled and not even its former station or terminal facilities for truck or lighterage traffic would be required. (R. 182-3)

Having thus made substantial expenditures and commitments in reliance upon the original grant, appellee is protected by the Fifth Amendment against having its certificate rights withdrawn.

VI.

THE COMMISSION HAS CONFUSED THE NEW YORK-NEW ORLEANS APPLICATION AND THE NEW YORK-TEXAS CITY APPLICATION.

At page 20 of the government brief, in discussing the New York-Texas City application in comparison with the New York-New Orleans application, the following statement is made: "The original and the amended certificates

cover both routes, and that circumstance has never been seriously objected to". This is a misstatement of fact. From the very outset Seatrain has insisted that the Commission separate the New York-New Orleans application from the New York-Texas City application and the Commission has at all times refused to do so.

The reason for Seatrain's insistence upon a separation is that the law relating to "grandfather" applications is entirely different from the law applicable to applications for the future based on public convenience and necessity, and the Commission's duties in the premises are quite different.

As to grandfather rights, the statute contemplates merely an inquiry into the common, contract or private carrier status of the applicant and the routes and ports served and makes mandatory issuance of a certificate accordingly, regardless of the need of the service or its efficiency. (Section 309(a)) A certificate based on public convenience and necessity, on the contrary, has no necessary relation to past service and involves an inquiry into the extent to which a proposed service is required in the public interest. An applicant for a proposed service who has no other service could not be tied to service methods employed by him in the past. The Newtex certificate issued three weeks prior to Seatrain's "corrected" certificate and covering the same route has no restrictions whatever as to service methods; Like other certificates, the certificate issued to Newtex was in all respects similar to Seatrain's original certificate. It is of interest to note that in originally deciding the Newtex certificate matter the Commission found that the future public convenience and necessity required operation by Newtex, even though Newtex had no vessels and the Commission did not know what type of vessels they would obtain or by what methods their service would be conducted. The Commission said in its decision in the Newtex case: "Applicant has no vessels available to perform the service. It intends to secure vessels as soon as conditions permit. We will therefore withhold issuance of a certificate at this

time". *Newtex S. S. Corporation Common Carrier Application*, 260 I. C. C. 418, decided January 11, 1945. Somewhat later Newtex acquired a vessel and the Commission issued a certificate to the Newtex line effective October 12, 1945, similar to the original Seatrain certificate.

In like manner in its original decision as to the Seatrain certificate, the Commission held upon consideration of the evidence, including numerous letters from the shipping public which are set forth at pages 293 to 322 of the printed record, that "the present and future public convenience and necessity require operation by applicant as a common carrier by self-propelled vessels, in interstate or foreign commerce, in the transportation of commodities generally between the ports of New York and Texas City. . ." (R. 56)

In spite of this clear finding, and in spite of a comprehensive record showing public need for Seatrain's service, including the need for the handling of articles so large that railroad cars cannot handle them (R. 307), the Commission has persisted over the objection of Seatrain, in embracing both applications in a single certificate. This error became obvious when Division 4 reopened the case so as to "correct" Seatrain's certificate to conform to the alleged service methods which it had employed in the New Orleans service. Assuming arguendo that the New Orleans service was unnecessary and inefficient, Seatrain still was entitled to a certificate for that service. But it was not entitled to a certificate for the proposed service to Texas City unless the public interest required it.

At the hearing before the Commission the following colloquy took place between counsel for Seatrain and the presiding Commissioner:

> Mr. McCollester: May I say further, Mr. Commissioner,—and this is looking ahead rather than to the immediate situation here—that if we shall later go to hearing on this, I think the hearing ought to be—the two applications ought to be segregated for hearing.
>
> One is a Grandfather Clause application and the other is an application under the interim, calls for a

certificate of public convenience and necessity, and I think the issues are different, our proof would have to be different, and the record might be one that you would want them heard in such a way that there would not be any confusion as to the evidence in each.

Commr. Porter. Well, that ought to be easily handled.

Mr. McCollester: I should think it could be easily handled, too. (R. 332, 333)

Seatrain reiterates its objection to the confusion of the two applications and respectfully insists that there are no findings or any evidence to show that the public convenience and necessity require any service restrictions as to the New York-Texas City service. The Commission has attempted to impose the most severe restrictions upon Seatrain's New York-Texas City service, although imposing no restrictions whatsoever on the new certificate of the Newtex line covering a parallel route.

In so confusing the two applications the Commission has failed to perform its statutory duty and has imposed on Seatrain as to its New York-Texas City service, severe limitations without any evidence or any finding that the public would be benefited by converting Seatrain from a common carrier of commodities generally to a mere car ferry or "bridge" carrier. In fact, the Commission's action is contrary to its previous findings and to the specific finding referred to by Seatrain in its application that Seatrain is a "common carrier of commodities generally" as distinguished from a car ferry. *Investigation of Seatrain Lines, Inc.*, 195 I. C. C. 215. In that proceeding the Commission found that Seatrain's method of operation "is not the method used in operating any other ferry here or elsewhere in the world. The nature of the service rendered, while similar, is not the same as that rendered by ferries". That being so, Division 4 held in its original decision here that Seatrain was entitled to a certificate as a common carrier of commodities generally. The "corrected" certificate is inconsistent with both findings and is not supported by any other findings, nor could it be on this record.

VII.

THE COMMISSION'S ACTION CANNOT BE DEFENDED ON THE THEORY THAT A CERTIFICATE IS AN "ORDER" AND IS SUBJECT TO THE PROVISION OF THE ACT EMPOWERING THE COMMISSION TO MODIFY ITS ORDERS.

Fully aware that it is without express statutory power to revoke a certificate, the Commission is driven to argue that section 315(c)* which authorizes the Commission to revoke or modify its *orders* can be interpreted in such a manner as to vest in the Commission the power to revoke the *certificate* of a common carrier by water.

The following is quoted from the argument before the court below:

> "Biggs, J.: Let us reduce it even more narrowly. Let us assume, *arguendo*, that they had not acted on it, that they had merely received it. Treat it from your angle. Where does the Commission get the power to revoke it?
>
> "Mr. Dumbauld: As I say, there are no decisions I know of on the point.
>
> "Biggs, J.: Well, is there any point in the law other than 315(c)?
>
> "Mr. Dumbauld: My argument is really simply one based upon public policy and the inherent power of any tribunal to correct errors and inadvertences. It seems to me, as the Commission has said, it would open the door to the assumption and exercise of powers which Congress has not granted if the Commission simply by making a mistake could validly do something in such a way that it could never be corrected or changed.

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* Section 315(c):

"The Commission may suspend, modify or set aside its orders under this part upon such notice and in such manner as it shall deem proper."

"Biggs, J.: It keeps bothering me a good deal, and that brings me to this second point: You really rely on 315(c), don't you? That is the only thing in the law.

"Mr. Dumbauld: The only thing in the law is that provision, that they may reconsider their orders." (R. 200)

It is a significant fact that in the part of the statute dealing with certificates of water carriers the word "order" is never used. There is a vast difference between an ordinary rate or regulatory order, on the one hand, and the franchise of a common carrier on the other. From the very nature of things, it is necessary to vest in the regulatory agency power to alter or amend from time to time its ordinary regulatory *orders*. Costs of transportation are forever changing; the volume of traffic fluctuates from year to year and even from month to month; the financial condition of all types of carriers changes for good or ill with general changes in economic conditions. As this brief is being written the railroads are appealing to the Interstate Commerce Commission for a 25 per cent increase in rates based on alleged increases in operating expenses of $1,800,000,000 since 1939. Regulation would be utterly impossible if the Commission were without authority to modify its rate and other regulatory orders from time to time with changes in conditions.

On the other hand, the franchise of a common carrier by railroad or of a common carrier by water is intended to be perpetual. It is believed that with the exception of temporary certificates issued under Section 311 of the Act, no certificate has ever been issued by the Commission except in perpetuity. It is always understood when a certificate is issued to a common carrier by water that substantial investments will be made under it and that it must be permanent if the necessary capital is to be forthcoming.

This latter point may well be stressed. Our merchant marine could never be developed in the manner contemplated by Congress if investors felt that rights granted in

a certificate issued under Part III could be substantially withdrawn at the whim of the Commission. The Court will take judicial notice of the fact that an operation like that of Seatrain between the North Atlantic and the Gulf requires millions of dollars to be invested. The necessary capital will be forthcoming only if the holders of certificates, like the holders of public utility franchises, can regard the rights granted as permanent. It is difficult to believe that Congress, which has taken so many steps to develop a strong merchant marine, did not have this point in mind in withholding from the Commission the right to revoke water carrier certificates although it had granted such right as to motor carrier certificates.

The government lacks confidence in its contention that a certificate is merely an order. The following is quoted from the record below:

> "Biggs, J.: . . . What language is there in the statute on which you rely and which would give the Commission the right to change its certificate now after it has been issued?
>
> "Mr. Dumbauld: Well, just the provision that relates to orders. As Mr. La Roe says, there may be a difference between an order and a certificate . . . " (R. 204).

Appellee deems it unnecessary to reply to the point on page 50 of appellants' brief to the effect that under the provisions of Section 17(7) the Commission may, after reconsideration, modify or reverse the decision of any individual Commissioner or board.

The Commission itself has recognized the difference between a certificate and an order in *Smith Bros. Revocation of Certificate*, 33 MCC 465 where the Commission said at p. 472 that a motor carrier certificate "once effective, may be terminated by us only on the conditions and according to the procedure, therein specifically provided. We may issue decision upon decision, *and order upon order* . . . but once a *certificate* duly and regularly issued becomes effective, our authority to terminate it is expressly marked off and limited." (Emphasis supplied)

VIII.

THE COMMISSION'S ACTION CANNOT BE DEFENDED ON THE GROUND THAT THE COMMISSION IS EXERCISING ITS AUTHORITY TO ATTACH TERMS AND CONDITIONS TO THE EXERCISE OF RIGHTS.

Obviously under section 309(d)* the Commission has authority to attach "terms, conditions and limitations" from time to time to the "*exercise* of the privileges granted." (Emphasis supplied) This was recognized by the court below. But the court below drew a distinction, which is manifestly sound, between attaching conditions to the *exercise* of the privileges granted, on the one hand, and *revocation* of the privileges themselves on the other. The language of the court below is:

> "The terms or conditions or limitations which may be imposed by the Commission under the authority of the section cited cannot sanction the radical step which the Commission has taken of transmuting a common carrier by water of commodities generally into a car-ferry." (R. 122)

The court doubtless had in mind that the Commission has the power to require a common carrier by water, within the scope of its certificate, to comply with regulations as to tariffs, as to the rendering of accounts, etc., to avoid discrimination, etc. But such power to attach conditions to the *exercise* of the rights is to be distinguished from the right to withdraw or destroy the rights themselves. Here the limitations are so severe that they would virtually destroy Seatrain, taking away three-fourths of its traffic. (R. 188).

The court below recognized that the Commission's action here, far from merely attaching conditions to the exercise

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* Page 76, *infra*.

of the certificate rights, changed the whole status of Seatrain. To quote from the opinion:

> "The amended certificate limiting transportation to property loaded in freight cars received from and delivered to rail carriers without transfer, in effect reduces Seatrain to the status of a car-ferry. It may not initiate or terminate traffic; it may not deliver freight to a truck or any receiver other than a railroad."

By its own admission the Commission sought here, not merely to attach conditions or limitations to the grant, but to change the grant itself so as to "establish substantial parity between future operations and prior bona fide operations." (Brief, p. 27). Taking the Commission's own premise, its action was intended to take away a substantial part of the original grant, which it deemed "too broad," as distinguished from merely attaching conditions to the *exercise* of the privileges granted.*

At page 24 of appellants' brief emphasis is laid on the fact that the original certificate was expressly subject to such limitations as the Commission may attach. It is hardly necessary to make the point that the Commission may not, by such a clause in a certificate, give itself powers which the statute does not give. Here the limitations are beyond the Commission's power because (a) they revoke a very substantial part of the original grant; (b) they relate to service methods over which the Commission has no jurisdiction.

Gemsco, Inc. v. *Walling*, 324 U. S. 244, relied upon by the government, is authority for the well-established proposition that where an agency is authorized by statute to impose terms and conditions in connection with its orders, it may impose such conditions as are necessary to achieve the purpose of the legislation. Here, however, the government attempts to impose conditions as to the service methods by

* The government makes the important admission (brief, p. 22) that "the modification here involved was restrictive, and to that extent a revocation *pro tanto* . . . "

which Seatrain shall conduct its transportation operations, which power Congress has not granted at all, and in addition it would impose terms and conditions which render useless additional facilities already purchased by Seatrain at Edgewater for the improvement of its service, in direct violation of the proviso in Sec. 309(d).

IX.

THE CLAIM OF INADVERTENCE IS NOT SUPPORTED BY THE RECORD.

Because of the emphasis which the government lays on alleged inadvertence it is necessary to appraise carefully and adequately the merits of that claim. Instead of showing inadvertence at the time of the original decision, the record shows a clear change in administrative policy *18 months later* and a contemporaneous attempt then, and for the first time, to reduce Seatrain to the status of a car ferry to conform to that change in policy—a reversal of position which the Court will find difficult to understand in view of the Commission's earlier finding, in a case addressed to that specific issue, that Seatrain is a general common carrier by water *as distinguished from a car ferry*. (*Investigation of Seatrain Lines, Inc.*, 195 I. C. C. 215)

Counsel for the government admits that the inadvertence "came up" when the *Foss case* was decided. The following is from the record in the court below:

> "Leahy, J. I understand that, but do you go so far as to say that they can ask them to come in and resubmit the data upon which they based their application under the grandfather clause in order to see if you made an inadvertence? In other words, did you arrive at the conclusion that there was inadvertence in this case prior to inviting Seatrain to come in and explain their position?
>
> "Mr. Dumbauld. Yes. The inadvertence, as I see it, came up when the Commission became aware by its decision in the Foss case that 'general commodities'

might not include freight cars. They there held that freight cars were not included under 'general commodities.' Well, if that is true it immediately becomes clear in the Seatrain case that Seatrain has not been granted all that it should have been granted." (R. 202-3)

It is important that we make clear the change in administrative policy which took place on December 18, 1943. Prior to that time it had been the policy of the Commission to issue to common carriers by water a broad and unrestricted type of certificate recognizing them to be common carriers of commodities generally and without prescribing the type of vessel or the service methods by which they might conduct their common carrier operations. Such an unrestricted certificate was issued not only to Seatrain but to all of its common carrier competitors, as the government concedes.* Uniformly in such certificates the applicant was authorized in broad terms "to continue in operation as a common carrier by self-propelled vessels in interstate or foreign commerce, in the transportation of commodities generally between" the ports involved. There was never any limitation as to the type of vessel except that as to common carriers engaged in towing barges the Commission used the expression "common carrier in the transportation of commodities generally by the use of *non-self-propelled* vessels with separate towing vessels between" etc.

A certificate of the latter type was issued on August 26, 1942, to Foss Launch & Towing Company, a common carrier towing company operating on Puget Sound. (*Foss Launch & Tug Co. Application*, 250 I. C. C. 817) Accus-

* The following took place at the hearing in the court below:

"Leahy, J.: Keeping in mind, if I might add to the question, that at the time the certificates were issued under the grandfather clause the same techniques were followed in issuing certificates to all other carriers.

"Mr. Dumbauld: Yes, I think there is no doubt of that, that the certificate issued to Seatrain was in the same form as was issued to all other carriers . . ." (R. 198)

tomed to towing barges containing any commodity whatever, Foss construed the broad language of its certificate as authorizing it to tow freight in railroad cars between railroad terminals, and it did so.

Foss had good reason to give a broad construction to its certificate because in an earlier case involving its subsidiary, Marine Oil Transport Company, operator of a car ferry, Division 4 was divided on the question whether a separate certificate was needed by the Marine company for its car ferry operations in view of the fact that Foss already had a certificate broad enough to cover its subsidiary's car ferry operations. No question was raised at that time about interpreting the Foss certificate as prohibiting the carrying of cars. Indeed, the subject is not even discussed in the decision.

Upon complaint by a car-ferry competitor the Commission reopened the Foss certificate case and, after hearing, held for the first time, on December 18, 1943, that a certificate issued to a common carrier by water to transport commodities generally does not include the right to perform car-ferry service.

It is not necessary for the purposes of the Seatrain case to decide whether the Commission was right or wrong in the *Foss case*. It is interesting to note that counsel for the government has doubts about the soundness of the decision:

> "Biggs, J.: Don't you think the original certificate is pretty broad, broad enough to carry the use of cars? . . . Do you feel that that is too narrow under the *Foss case* to include cars?
>
> "Mr. Dumbauld: It is under the *Foss case. Personally I am not sure that the Foss case was correctly decided by the Commission.*
>
> "Biggs, J.: You don't think that was a further inadvertence, do you?
>
> "Mr. Dumbauld: That would be improvident." (R. 204) (Emphasis supplied)

The Court will observe from the record that the alleged inadvertence was not discovered prior to December 18, 1943, when the second decision in the *Foss case* was rendered.*

It was on December 18, 1943, the very day of the second Foss decision, that the Commission reopened the Seatrain certificate proceeding and authorized the director of its Bureau of Water Carriers and Freight Forwarders to address a letter to counsel for Seatrain citing the second decision in the *Foss case* and transmitting a proposed report and a proposed "amended order" which would have had the effect of converting Seatrain from a common carrier of commodities generally to a mere car ferry.**

This was a great shock to Seatrain, not only because its unrestricted certificate had been in effect for a year and a half and large expenditures made in reliance on it, but because the Commission had specifically held in other proceedings that Seatrain was not a car ferry but a common carrier of commodities generally. Not only that, but the Commission knew full well and now concedes that Seatrain's operations went far beyond those of a car ferry. (Appellants' brief, p. 38) Specifically, the Commission concedes: (a) that Seatrain maintains its own stations reached only by truck and that it is entitled to reach such stations

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* The Commission now appears to concede (p. 8 of appellants' brief) that the reopening of the Seatrain proceeding was occasioned by the decision in the Foss case.

** The following is quoted from the letter written by the Bureau of Water Carriers and Freight Forwarders:

> "Enclosed is a copy of a report on reconsideration in W-587, *Foss Launch & Tug Co.* It will be noted that the certificate issued that company provided for 'the transportation of commodities generally.' Substantially the same wording was used in the certificate issued in that case and in W-543, your case.
>
> . . .
>
> "This leads directly to the further consideration of the wording of the certificate issued Seatrain Lines, Inc. Division 4 has reopened that proceeding for further consideration. It is thought that the enclosed copy of draft of report sets forth the reasons for issuing Seatrain Lines, Inc. an amended certificate and order." (R. 57)

(p. 38 of appellants' brief); (b) that Seatrain is entitled to handle lighterage traffic (*ibid.*); (c) that Seatrain's service is not limited to the points of rail interchange but covers other points in the port areas (R. 54); (d) that Seatrain freight must at times be transferred from railroad cars. (*Hoboken Divisions Case*, 234 I. C. C. 114, 124); and (e) that Seatrain's lighterage traffic is not interchanged with Hoboken Manufacturers Railroad, the only railroad with which Seatrain had physical connection at New York (*ibid.*, p. 122). In view of these admissions, and in view of the specific finding that Seatrain is a common carrier of commodities generally as distinguished from a car ferry (195 I. C. C. 215) it is impossible to understand the reasoning which led the Commission to convert Seatrain to a car ferry.

The distinctive characteristics of a railroad car ferry connecting two rail terminals is that it functions as a "bridge" carrier, receiving no freight from shippers, delivering no freight to consignees, interchanging no freight with trucks or lighters, maintaining no stations, and handling cars without transfer of freight. This would be Seatrain's exact status under the terms of the "corrected" certificate. This is a carrier which the Commission has for 13 years recognized as a common carrier of commodities generally, as distinguished from a car ferry, because "the nature of the service rendered, while similar, is not the same as that rendered by ferries." *Investigation of Seatrain Lines, Inc.*, 195 I. C. C. 215, 222. In this connection it is significant that a majority of the Commission's Division 4 disagreeing through all the years with the majority of the Commission, has considered Seatrain a car ferry. Thus 13 years ago Commissioner Mahaffie in his dissenting opinion in the case last cited described Seatrain as not a common carrier by water but as "an improved car ferry", and as a common carrier by railroad. (*ibid.* p. 234) Commissioner Miller, joining with Commissioner Meyer in a dissent in the same case, said, "If the Seatrain vessels . . . are car ferries, as I believe they are, we may control them

to the same extent that railroads are controlled . . ." (*ibid.*, p. 233) Commissioner Miller agreed with Commissioner Mahaffie that Seatrain was a common carrier by railroad operating a car ferry.

At least so far as Division 4 is concerned, therefore, which first made the claim of "inadvertence" in the issuance of the original certificate, we face the unpleasant fact that while the certificate originally issued was in complete conformity with the views of the majority of the Commission over a period of 13 years, the "corrected" certificate reflected a dissenting view which the majority of Division 4 had long entertained. Their "inadvertence" consisted of issuing originally to Seatrain a certificate which accorded it the status of a common carrier by water which a majority of the Commission had recognized in at least 7 decisions.* The confusion of the Commission is obvious. It reopened the Seatrain case in order to make the Seatrain certificate conform to its past operations. The Commission had held over a long period of years that its operations were those of a common carrier of property generally by water as distinguished from a car ferry. Division 4, a majority of whose members had considered Seatrain a railroad car ferry, thereupon proceeded to issue a certificate converting Seatrain into a railroad car ferry and claiming that its original action, which conformed with the majority views over a long period of years, was inadvertent.

Whatever may have been the reasoning, the action was *deliberate*, and it resulted from the aforesaid change in administrative policy in the *Foss case*. There is, we submit with all deference, no escape from the conclusion that on December 18, 1943, Division 4 of the Commission, having in mind its decision in the *Foss case*, decided at least tentatively that the Seatrain certificate would have to be re-

* The decisions referred to are those cited by Commissioner Lee at page 40 of the printed record.

duced to a car-ferry basis; that it caused a letter to that effect to be written to counsel for Seatrain; that it reopened the proceeding for the purpose of so restricting the Seatrain certificate, later assigning the matter for hearing and inviting Seatrain to be present. This course of action proves, not inadvertence, *but a deliberate procedure designed to restrict Seatrain to a car-ferry operation.*

Our conviction on this point is confirmed by the able dissenting opinion by Commissioner Lee (R. 40) in which he shows with unerring logic why there could not possibly be inadvertence.* Says he:

> "The division's action in reopening this proceeding more than 18 months after the certificate had been regularly issued was not due to the filing of any request therefor on the part of Seatrain or any of its numerous competitors. On the contrary, the proceeding was reopened by division 4 on its own motion solely because the division changed its mind as to the quantum of authority it should have issued to Seatrain. On December 18, 1943, on reconsideration in Foss Launch & Tug Co. Applications, 260 I. C. C. 103, division 4 amended the certificate issued to the Foss Company on August 26, 1942, which authorized transportation of commodities generally, by eliminating therefrom authority to transport 'freight cars, loaded or empty, in the performance of a freight-car ferry service.' To justify this action the division held that the certificate issued to the Foss Company did not include the right to engage in freight-car ferry service. On the same day on which it issued the amended certificate to the Foss Company, the division reopened the instant proceeding for reconsideration and directed our Bureau of Water Carriers and Freight Forwarders to call Seatrain's attention to its action on reconsideration in the Foss case and to suggest that Seatrain's certificate be amended so as to restrict the authorized operations to the transportation of liquid cargoes in bulk, of empty railroad cars, and of prop-

* The quality of Commissioner Lee's dissent is such as to commend it highly. Commissioner Lee was formerly Chief Justice of the Supreme Court of Idaho.

erty loaded in freight cars received from and delivered to rail carriers without unloading such property from the freight cars. Seatrain opposed such amendment of the certificate. Thereupon, on January 27, 1944, division 4 reopened this proceeding for hearing.''.

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''On December 5, 1944, the Commission affirmed the action taken by the division, on reconsideration, in the Foss case. I dissented because I felt that we were without power to change, amend, or revoke in part, the certificate issued to the Foss Company on August 26, 1942, without its consent and that, in any event, 'transportation of commodities generally' should embrace transportation of all classes of property, including railroad cars, loaded or empty.

''It seems appropriate here to point out that Seatrain contends, and the record indicates, that it transported various commodities in port-to-port service, on its own billing, which were not 'loaded in railroad cars received from and delivered to rail carriers and transported without transfer from railroad cars.' In *Hoboken Mfrs. Co.* v. *Abilene & S. Ry. Co.*, 248 I. C. C. 109, at page 113, we found that:

> 'Moreover, the evidence shows that Seatrain does move a very substantial number of empty cars, routing them preferably by Havana in the hope that there they may pick up loads. It is also shown that a large volume of traffic via Seatrain originates or terminates at the ports, and that a supply of cars for traffic so originating is there maintained at Seatrain's expense.'

''The reports of our investigation of Seatrain disclose that it leased cars from private car companies.

''As stated in the report of the majority, there is no intimation of fraud or misrepresentation on the part of applicant. This proceeding was reopened by division 4, on its own motion, for the reasons stated above. In my opinion, we cannot fairly find that the certificate issued to Seatrain on July 2, 1942, and which has been in effect since that time without objection

from anyone, was inadvertently issued. On the contrary, it was duly and regularly issued in accord with the findings of the division. Not having been issued through inadvertence, we are without power to change, or amend, or revoke it, in whole or in part, without Seatrain's consent. A certificate is something more than a mere revocable license. It is similar to a franchise." (R. 41-44)

Commissioner Alldredge, dissenting, said:

"The certificate issued to applicant in this instance was in conformity with the findings, and so far as the report of Division 4, which issued the certificate, discloses, the findings were not the result of inadvertence or oversight, but were the product of a deliberate exercise of judgment." (R. 50-51)

It is not necessary to labor the point because counsel admitted (R. 203) that the inadvertence "came up when the Foss case was decided." The Foss case, of doubtful validity even in the opinion of government counsel, (R. 204) laid down a new adminstrative interpretation of the meaning of "common carrier of commodities generally." The so called inadvertence was in reality an attempt to make this new and doubtful interpretation retroactive as to Seatrain, although its rights under the certificate had long since become vested.

Impossibility of Inadvertence as to the New York-Texas City Operation.

Since the application for the New York-Texas City service involved no grandfather rights, being an application based solely on public convenience and necessity, the Commission finds itself in the impossible position of having changed such certificate without evidence and without any showing that the public convenience would be served by the restrictions imposed. As previously explained, the combined certificate issued to Seatrain was identical with those issued to its competitors, including that issued to Newtex

Line, as a common carrier of commodities generally between New York and the ports of Brownsville and Houston on January 11, 1945, three weeks before the "correction" of the Seatrain certificate. *Newtex S. S. Corporation Common Carrier Application,* 260 I. C. C. 418. Thus, all of Seatrain's competitors, both established lines and newcomers to the trade, are given the full grant as common carriers of commodities generally. Only Seatrain is to be limited. The "correction" of the Seatrain certificate was admittedly based on the old record. (R. 343) The Commission now claims that it was "inadvertent" in not placing the restrictions on Seatrain when the original certificate was issued. Since there is no evidence to support its later action, and since its original action was in exact conformity with all its previous decisions in such matters, there was no inadvertence.

On the contrary, the Commission found on January 11, 1945, that the public was in need of additional service by common carriers by water of commodities generally and granted a certificate for such service to the Newtex Line on the condition that Newtex would purchase a vessel and institute service before December 31, 1945. Three weeks later, the Commission "corrected" Seatrain's "Texas City" certificate in such manner that the public would be deprived of the services of Seatrain's vessels. The public's loss of the services of these large and versatile Seatrain vessels would be many times greater than the gain from the services of the Newtex vessel. The Commission's action, therefore, in restricting the Seatrain vessels to car-ferry service, only three weeks after issuing the certificate to Newtex, was contrary to its own findings in that case also.

What caused this grotesque result is clear. The Commission, over repeated protests by Seatrain, combined the New York-Texas City application (based on public convenience and necessity) with the New York-New Orleans application, (based on grandfather rights) in such a manner as to reverse the former finding and to hold that the public

will be better served by restrictions than without them. The Commission's decision will be searched in vain for a finding that the public convenience and necessity will be better served if the Seatrain certificate is limited to a pure car-ferry basis. It was only by combining the two certificates that such an indefensible result could have been reached.

In the light of the foregoing facts there is no escape from the conclusion of Commissioners Lee and Alldredge that the action of the Commission was deliberate and not inadvertent.

X.

IT WOULD HAVE BEEN INAPPROPRIATE FOR SEATRAIN TO INTRODUCE NEW EVIDENCE AT THE HEARINGS BEFORE THE COMMISSION.

At page 3 of the government brief the statement is made that Seatrain "repeatedly declined to introduce that (evidence as to reliance) or any other evidence before the Commission at the modification hearings."

The truth is that Seatrain was never invited to introduce additional evidence. The Commission stated that it desired to correct the certificate to conform to the facts of record in the light of the new interpretation given in the *Foss case*. Since Seatrain is a common carrier by water subject to the Commission's jurisdiction the Commission could have subpoenaed any evidence that was pertinent. Not only did it not do so, but it did not go beyond inviting Seatrain to reply to Director Girault's letter of December 31, 1943 (R. 57). Seatrain not only replied to the letter in detail, pointing out the errors in the proposed description of Seatrain's service (R. 61) but it showed by affidavit its reliance upon the original certificate, and again protested the combining of the two certificates. (R. 76)

Because of the trenchant criticism of Seatrain for its alleged "refusal" to introduce new evidence a brief review of the facts is necessary.

About one week after Seatrain's reply to the said letter, Division 4 of the Commission issued a further order reopening the proceeding:

> "for hearing upon the question of whether or not the said findings and certificate and order of July 2, 1942 should be modified so as to authorize applicant to continue to operate in service in which it was engaged, except for interruptions beyond its control, namely, as a common carrier by the "Seatrain" type of vessels in the transportation of liquid cargoes in bulk; of empty railroad cars, and of property loaded in freight cars received from and delivered to rail carriers and transported without transfer from the freight cars between the ports above mentioned." (New York, New Orleans and Texas City.) (R. 68)

As more fully set out in the Statement of the Case (p. 4, *ante*) the Commission duly assigned the matter for hearing and appellee filed a motion (R. 69) praying that the Commission's order reopening the matter be vacated on the ground that appellee had incurred substantial expense and had made important commitments pursuant to and in reliance upon the certificate as originally issued and that the Commission was without authority to cancel, alter or amend said certificate so as to revoke or restrict the rights, authorization and privileges held by appellee thereunder, and that any attempt so to do would take appellee's property without due process of law. Appellee again prayed for a severance of the two certificates and warned the Commission of its lack of statutory authority to prescribe the service methods of water carriers. When the matter was called for hearing counsel for appellee renewed the motion (R. 329) that the Commission vacate and rescind its order reopening the proceeding. The presiding Commissioner overruled the motion (R. 331) and an appeal was taken by counsel to the full Commission (R. 333) on the same grounds. Prior to the hearing there was filed the aforesaid affidavit of Graham M. Brush, appellee's president, that appellee, "in reliance upon the certificate, has made substantial expenditures and commitments and, among other

things, has reacquired title from the United States to four vessels . . . Seatrain Lines, Inc. would not have made these expenditures nor entered into the commitments if it had reason to believe that the Commission would or could reopen the proceeding upon its applications for the purpose of changing . . . the certificate by including therein any new terms, conditions or limitations designed to have the effect of altering the operating rights . . ."

By order dated April 3, 1944, the Commission overruled appellee's motion (R. 78). A petition for reconsideration was denied and the matter was again assigned for hearing on April 24, 1944, at which time counsel for appellee appeared for the purpose of challenging once more the jurisdiction of the Commission to revoke the privileges granted after reliance thereon by the grantee. Counsel advised the Commission that appellee did not concede and would challenge the Commission's jurisdiction to do what it proposed. (R. 338). The presiding Commissioner announced that the Commission would have before it and would take into consideration the cases referred to by appellee in its applications and incorporated therein, and that the Commission would also have before it appellee's applications and all of the material and supporting documents filed by appellee in support of its applications, either at the time said applications were filed or subsequently thereto, together with the correspondence with the Director of the Commission's Bureau of Water Carriers and Freight Forwarders (R. 341-3). Thereupon the following colloquy took place place between counsel for respondent and the presiding Commissioner:

> "Mr. McCollester: * * * If I correctly understand, all of the material to which Your Honor has referred, is material which was presented in connection with the applications considered by the Commission in issuing its order of July 2, 1942 which contains certificate and was the material upon which that certificate was based. If that clearly appears, of course, we, ourselves, would want that. We want to have that clearly understood. The only objection we would have to the consideration by the Commission at this time, or the re-

ceipt for purposes of consideration of any evidence or material of any sort in the nature of factual information which was not before the Commission and was not considered by it in issuing the certificate.

Commr. Porter: Well, Counsel understands of course that the reports of the Commission to which I have referred and identified in the record here, were all matters of our records and were before us at the time, and were available to us at the time we issued the certificates.

Mr. McCollester: That is right.

Commr. Porter: And that is also true of these offers I have just made of documents and letters directly connected with at the time of your application. They are all in the docket and they are, of course, subject to inspection and examination by respondent's Counsel at any time.

Mr. McCollester: Yes, and of course, Mr. Commissioner, we take the position that the certificate was issued in the light of all of the facts disclosed thereby." (R. 343)

In view of the foregoing, and because of appellee's contention, to which it now adheres, that the Commission was without jurisdiction to hold hearings as a basis for revoking and modifying the certificate, appellee had no evidence to offer, especially since it was agreed that this would be a test case and that it would be decided on the facts of record.

If the Commission felt the need of additional evidence it would not have prepared a proposed report, and a proposed corrected certificate (R. 58-61) in advance of the hearing. In assigning the case for hearing it requested no new evidence of any party, and the presiding Commissioner made it plain that the Commission would decide the case on the record. One wonders why the case was set for hearing under these circumstances. Be that as it may, it would clearly have been inappropriate for Seatrain to introduce new evidence under such circumstances and in the absence of any request for new evidence by the Commission and in view of Seatrain's conviction that the Commission was utterly

without statutory power or right under the Fifth Amendment to take the action proposed. It did, however, warn the Commission of the errors in Director Girault's letter, of its lack of jurisdiction, of Seatrain's reliance upon the original certificate and of the impropriety of combining the two certificates.

The government's argument on this point rests on confusion between the purpose of the further hearings and the nature of the evidence subsequently presented to the District Court. The correspondence between the Commission and counsel for appellee shows clearly that the whole purpose of the further hearings was to consider the Commission's proposal that the certificate should be "corrected". But further than this, the evidence introduced in the lower court was not evidence which would have been appropriate or proper for consideration by the Commission in the exercise of its administrative functions. If it be assumed, for the sake of argument, that the Commission had authority to modify its order and "correct" the certificate issued, the only evidence which would have been proper would have been evidence directed to the Commission's action in this regard. As to the "grandfather" certificate, evidence concerning the action of Seatrain in 1945 could have no possible relation to any question as to the nature of the rights to which Seatrain was entitled, which depended upon its business and activities in 1940. With respect to the Texas City certificate, which rested upon a finding of public convenience and necessity, the Commission's order of reopening certainly did not invite any new evidence upon the public interest question because the Commission's order reopening the matter, when read in connection with all the surrounding circumstances, plainly indicated that the Commission was concerned only with whether the original certificate was responsive to the previously offered proof and to the Commission's findings in earlier cases.

The evidence presented to the court, on the contrary, was with regard to Seatrain's reliance upon the original

certificate. This evidence had absolutely no relation to grandfather rights or to public interest. That is to say, the proof offered in the court below was in no sense addressed to the Commission's administrative authority but dealt solely with the question whether, after the Commission had purported to exercise its administrative authority, its action in so doing would cause injury to Seatrain and whether Seatrain had, by acting in reliance upon the original certificate, accepted it.

Moreover, it is incorrect to say that the Commission had no knowledge of the situation, for Seatrain filed a motion to discontinue the further proceedings and dismiss the order of reopening, and in connection therewith presented in support of such motion an affidavit setting forth briefly the action taken in reliance upon the Commission's original order. It must be apparent that any evidence offered by Seatrain at the modification hearings as to the effect of the proposed "corrected" order upon Seatrain and the grave injury to Seatrain would have had no relation either to Seatrain's grandfather rights or to the question of public convenience and necessity. Hence such evidence was not appropriate for presentation to the administrative agency.

The cases cited in the government's brief are not in point, because the evidence there discussed was evidence relating to administrative matters. Had appellee offered evidence to the lower court as to its operations during the grandfather period, or as to public interest in Seatrain's New York-Texas City service, without first having presented such evidence to the Commission, the government's position here would be well taken.

Furthermore, even if the court below should not have received the evidence, its action in so doing did not render valid the Commission's order if the order was in fact in excess of the Commission's statutory authority, as Seatrain contends, and therefore, in any event, the injunction granted should not be set aside.

XI.

EVIDENCE AS TO APPELLEE'S RELIANCE UPON THE ORIGINAL GRANT AND OF THE DEPRIVATION OF PROPERTY UNDER THE "AMENDED" CERTIFICATE WAS PROPERLY RECEIVED IN THE COURT BELOW.

Since deprivation of property under the amended certificate is solely a constitutional question, the court below held that evidence as to the loss and injury to appellee caused by the cancellation of the original certificate and the substitution of the amended certificate was properly admissible. (R. 125.)

There is not involved here any question as to the introduction of evidence in the administrative category. The record before the Commission was complete and it called for no additional data, nor did any party introduce any. Nor did Seatrain introduce in the court below any new evidence except that dealing with its reliance upon the original certificate and the extent to which it would be deprived of property if its status were changed as proposed by the Commission.

At the hearing in the court below appellee offered the testimony of witness Graham M. Brush, president of Seatrain Lines, Inc., for the purpose of proving that appellee had substantially relied upon the certificate originally issued and that cancellation of the original certificate would operate to the serious disadvantage and injury of appellee and deprive it of property without just compensation and without due process of law in violation of the Fifth Amendment. The nature of appellee's expenditures and commitments is explained in a preceding chapter of this brief. (*ante*, p. 41).

Appellee's evidence as to reliance was received by the court below subject to the government's motion to strike, it being the government's position that the court might not receive evidence, even as to appellee's deprivation of prop-

erty, in addition to the evidence before the Commission. The court denied the government's motion and the evidence was admitted. The court below held on this point as follows (R. 125):

> "The testimony introduced by the petitioner showing its expenditure of funds and its large commitments in reliance upon the original certificate will not be stricken from the record. The petitioner has alleged that the Commission's order will deprive it '. . . of property and take its property for public use without just compensation and without due process of law in violation of the Fifth Amendment . . .'. The evidence referred to is pertinent to the question, one of mixed law and fact, raised by the petitioner. The testimony objected to supports the conclusion that the petitioner will be deprived of property without compensation and without due process of law if the order of the Commission shall become effective. See *B. & O. R. Co.* v. *United States*, 298 U. S. 349, 368-9, and *United States* v. *Idaho*, 298 U. S. 105, 108-9. See also Commissioner Porter's statement, note 5 supra."

The evidence on the subject of reliance introduced in the court below was directed exclusively to the *judicial question* which under the statute and under the Constitution is left for determination by the courts.

The decisions of this Court in *Baltimore & Ohio R. Co.* v. *United States*, 298 U. S. 349, 368-369, and in *United States* v. *Idaho*, 298 U. S. 105, 108-109, are clear authority for the admission of additional evidence, beyond that in the record before the Commission, as to constitutional and jurisdictional issues and all similar issues which are properly the subject of judicial, as distinguished from administrative, determination.

In the *Baltimore and Ohio case* plaintiff railroads had introduced additional evidence in the district court for the purpose of proving that the order of the Commission had prescribed divisions so low as to deprive them of property without just compensation. The Court after an extended examination of the question affirmed the right of the

railroads to an independent judicial determination of the constitutional question and affirmed the right of plaintiffs to introduce evidence in the district court *for the first time* on the issue of confiscation. The Court said (pp. 368-369):

> "The due process clause assures a full hearing before the Court or other tribunal empowered to perform the judicial function involved. That includes the right to introduce evidence and have judicial findings based upon it."

In the present case appellee charges that the revocation of its original certificate deprives it of property and takes "its property for public use without just compensation and without due process of law, in violation of the Fifth Amendment of the Constitution of the United States." Appellee's additional evidence was tendered in support of this constitutional allegation only and was not addressed to any administrative issue. To deny to appellee the opportunity to present evidence in support of the allegation on the constitutional point would operate to defeat appellee's constitutional rights. The enforcement of constitutional rights is purely a judicial function and the exercise of that function may not be limited or impaired by depriving the courts of the right to receive evidence *de novo* bearing solely upon the judicial question.

An analogous case is *United States* v. *Idaho, supra.* There the question was whether by the order in question the Commission had sought to exercise a power which it did not possess. Here the issue relates to the revocation of a certificate. In the *Idaho case* it related to the Commission's power to authorize the abandonment of an intrastate railroad spur. The statute specifically exempted the abandonment of "spur, industrial, team, switching or side tracks, located . . . wholly within one state." The issue was carefully considered by this Court and we take the liberty of quoting from the decision of the Court speaking through Mr. Justice Brandeis (108-109):

"The case was heard before three judges. The sole controversy was whether the trackage was a 'spur' or 'industrial track'; and, therefore, excluded from the jurisdiction of the Interstate Commerce Commission. The record made before the Commission was introduced in evidence; also some testimony 'which merely amplified evidence already in the record.'"

* * * * * * * * *

"The District Court concluded that the Talbot branch was constructed and has been maintained for the purpose of serving a single industry; that practically no other industry is served; that this trackage does not invade new territory; that its continued operation or abandonment is of local and not of national concern; that it is therefore a 'spur;' and hence, that the order of the Interstate Commerce Commission was in excess of its jurisdiction. The court annulled the order and enjoined its enforcement. 10 F. Supp. 712."

"The decree should be affirmed, because on findings amply supported by the evidence the trackage is a spur. Appellants object that, since the findings and order of the Interstate Commerce Commission were made on substantial evidence, they are conclusive, and that it was error to admit the testimony first offered in the District Court. Compare *Tagg Bros.* v. *United States*, 280 U. S. 420, 444, 74 L. ed. 524, 537, 50 S. Ct. 220. Although it would have been better practice to have introduced all relevant evidence before the Commission, as appellees' counsel concede, the court did not err in admitting the additional testimony. For whether certain trackage is a 'spur' is a mixed question of fact and law left by Congress to the decision of a court—not to the final determination of either the federal or a state commission."

On brief, the government cites the decisions in *Tagg Bros. & Moorhead* v. *United States*, 280 U. S. 420; *Acker* v. *United States*, 298 U. S. 426, *Shields* v. *Utah Idaho R. Co.*, 305 U. S. 177, and *National Broadcasting Company* v. *United States*, 319 U. S. 190.

The *Tagg Bros. case* was a suit to enjoin an order of the Secretary of Agriculture prescribing a tariff of maximum

charges for market agencies at the Omaha stockyards. A special master was appointed by the lower court to hear evidence and report his conclusions to the court. The master admitted, in addition to the record before the Secretary, oral evidence which, in condensed form, occupies 84 pages of printed record and 24 elaborate exhibits. Upon final hearing before the court, the additional evidence was held admissible and an injunction issued. In discussing the admissibility of additional evidence in the court proceeding Justice Brandeis, speaking for a unanimous Court, said:

> "... The validity of an order of the Secretary, like that of an order of the Interstate Commerce Commission, must be determined upon the record of the proceedings before him—*save as there may be an exception of issues presenting claims of constitutional right*, a matter which need not be considered or decided now. *Louisville & N. R. Co.* v. *United States*, 245 U. S. 463, 466; 66 L. ed. 400, 405; 38 Sup. Ct. Rep. 141. Compare *Liscio* v. *Campbell* (C. C. A. 2nd) 34 F. (2d) 646, 647. And See *Prendergast* v. *New York Teleph. Co.*, 262 U. S. 43, 50; 67 L. ed. 853, 858; 43 Sup. Ct. Rep. 466, and *Ohio Valley Water Co.* v. *Ben Avon*, 253 U. S. 287, 289; 64 L. ed. 908, 914, P.U.R. 1920E, 814, 40 Sup. Ct. Rep. 527 ..." (Emphasis supplied)

This Court, in upholding the validity of the Secretary's order, found it unnecessary to rule upon the question of admissibility of the additional evidence and passed the question; however, the principle that evidence bearing upon claims of constitutional right may be introduced in court was reaffirmed.

In addition to the rule that evidence may be received *de novo* in court on issues presenting claims of constitutional right, the *Tagg Bros. case* is also authority for the familiar rule that on questions which have been lodged with the Commission for final determination, the courts will consider only the record before the Commission. Inasmuch as appellee's additional evidence is tendered in support of the contention that the revocation of its original certificate de-

prives it of property in violation of the Fifth Amendment, and the question presented is clearly one upon which an independent judicial determination is to be made, the latter rule can have no application here.

Acker v. *United States; supra,* involves substantially the same facts and issues as the *Tagg Bros. case* and arose following the fixing by the Secretary of Agriculture, acting under the Packers and Stockyards Act, of maximum reasonable rates to be charged by market agencies doing business at the Union Stockyards in Chicago. The district court on final hearing dismissed the bill seeking an injunction against enforcement of the Secretary's order, saying:

> "Having considered the new evidence offered for the first time in this court, and all the evidence before the Secretary, and having concluded that there is no showing of confiscation, we find it unnecessary to determine whether the evidence offered for the first time in this court was admissible."

In the unanimous opinion of this Court, delivered by Mr. Justice Roberts, it was said that "It is to be noted that in spite of the allegations of the bill the case does not involve any question of confiscation." This being so, and in the absence of any other claim of constitutional right, appellee cannot perceive what possible bearing the *Acker case* can have here except to the extent that it supports appellants' erroneous reliance upon the familiar rule regarding review of findings of fact. Here again appellants seek to apply a rule which has been expressly held to be inapplicable to situations where a claim of constitutional right is asserted.

Shields v. *Utah Idaho R. Co., supra,* presented an inquiry into the scope of judic[illegible] review of a determination by the Interstate Commer[illegible] ommission, for purposes of the Railway Labor Act. [illegible] respondent was not an interurban electric railwa[illegible] this case, like the *Acker case,* involved no constitut[illegible]al or jurisdictional questions and hence is not pertinent. Mr. Chief Justice Hughes made plain the distinction between the principle involved in the

Shields case and that urged for appellee herein as announced in *United States* v. *Idaho, supra,* saying:

> "As Congress had constitutional authority to enact the requirements of the Railway Labor Act looking to the settlement of industrial disputes between carriers engaged in interstate commerce and their employees, and could include or except interurban carriers as it saw fit, *no constitutional question is presented* calling for the application of our decisions with respect to trial de novo so far as the character of respondent is concerned. With respect to that question, *unlike the case presented in United States* v. *Idaho,* 298 U. S. 105, 80 L. ed. 1070, 56 S. Ct. 690, where the Interstate Commerce Commission was denied the authority to determine the character of the trackage in question (Id. p. 107), the Commission in this instance was expressly directed to make the determination. As this authority was validly conferred upon the Commission, the question on judicial review would be simply whether the Commission had acted within its authority. (Emphasis supplied) (184-5)

Thus it will be seen that in the *Shields case* Congress, in the exercise of its constitutional powers, had decreed that the Interstate Commerce Commission, after hearing, was to determine the character of respondent. On that issue a court might not hear evidence unless it be urged that the Commission's determination is unsupported by evidence or is arbitrary or capricious. Decision as to the character of respondent is specially reserved by the Congress for the administrative agency. But in the case at bar a constitutional question *is* presented, to paraphrase the language of Mr. Justice Brandeis in *United States* v. *Idaho, supra,* which is "left by Congress to the decision of a court, not to the final determination of a federal commission."

In *National Broadcasting Co.* v. *United States,* this Court held that in reviewing certain regulations adopted by the Federal Communications Commission relating to granting of radio broadcasting licenses by that Commission, review by the Courts is limited to "the evidence before the Commission." The *Tagg Bros. case* and the *Acker case* are cited

as authority for the rule. It is apparent therefore that the *National Broadcasting Co. case* is but another decision in support of the familiar principle that the courts will not receive additional evidence on matters solely within the jurisdiction of the administrative agency. Appellee has no quarrel with the government as to the validity of the familiar principle in the cases last cited, but appellee is at a loss to know why these cases are cited in a case where only a judicial question is presented and where the factual record is complete.

Myers v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, relied upon by the government, supports the familiar rule that a party must exhaust his administrative remedy before applying to the courts. In that case the National Labor Relations Board had issued a complaint against the Bethlehem Company charging it with unfair labor practices. The Bethlehem Company sought and obtained an injunction against the holding of the hearing. This Court held that Congress had vested in the Board exclusive jurisdiction to hear and determine the facts and that the courts were without power to consider the matter except after hearing before the administration agency and upon appropriate judicial review. In the present case the questions for determination are purely judicial.

United States v. *Hancock Truck Lines*, 324 U. S. 774, is relied upon to support the proposition that Seatrain's alleged "failure to produce evidence" amounts to "an acquiescence on the facts" and that Seatrain is now estopped to produce evidence "which it refused to present to the Commission." In the first place, the Commission did not request Seatrain to produce any evidence, so there could have been no refusal. In the second place, Seatrain is quite willing to be bound by the facts of record in this case which show that even on a grandfather basis Seatrain had four times as many rights as are recognized in the corrected certificate. (R. 188) Seatrain relies here on the same record which the Commission indicated its willingness to

rely on at the modification hearings, namely, the facts in Seatrain's applications and accompanying exhibits and the decisions in certain previous Seatrain cases incorporated in this record. It is those facts upon which the Commission claims to have relied in limiting the certificate, and it is those facts upon which Seatrain relies to prove that the Commission withdrew three-fourths of the rights originally granted.

CONCLUSION.

Since the Commission is without statutory power to cancel and modify the certificate as proposed, and since appellee would be deprived of property in violation of the Fifth Amendment by such modification, the action of the court below setting aside and annulling the order of the Commission should be affirmed. The case should not be remanded to the Commission for clarification of its order, as suggested by the government (p. 39 of brief) because to do so would imply that appellee's certificate rights may be curtailed in spite of its reliance on the original grant and because no clarification is possible as to the New York-Texas City service inasmuch as the original certificate granted as to that service was based on a showing of public need, as the Commission duly found, and there have been no findings as a predicate for a different conclusion. There is, therefore, nothing regarding the New York-Texas City certificate to be clarified.

Respectfully submitted,

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APPENDIX A.

Sec. 309(a) Except as otherwise provided in this section and section 311, no common carrier by water shall engage in transportation subject to this part unless it holds a certificate of public convenience and necessity issued by the Commission: *Provided, however,* That, subject to section 310, if any such carrier or a predecessor in interest was in bona fide operation as a common carrier by water on January 1, 1940, over the route or routes or between the ports with respect to which application is made and has so operated since that time (or, if engaged in furnishing seasonal service only, was in bona fide operation during the seasonal period, prior to or including such date, for operations of the character in question) except, in either event, as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission as provided in subsection (b) of this section and prior to the expiration of one hundred and twenty days after this section takes effect. Pending the determination of any such application, the continuance of such operation shall be lawful. If the application for such certificate is not made within one hundred and twenty days after this section takes effect, it shall be decided in accordance with the standards and procedure provided for in subsection (c), and such certificate shall be issued or denied accordingly. Any person, not included within the provisions of the foregoing proviso, who is engaged in transportation as a common carrier by water when this section takes effect may continue such operation for a period of one hundred and twenty days thereafter without a certificate, and, if application for such certificate is made to the Commission within such period, the continuance of such operation shall be lawful pending determination of such application.

Sec. (b) Application for a certificate shall be made in writing to the Commission, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission shall, by regulations, require.

Sec. 309(c) Subject to section 310, upon application as provided in this section the Commission shall issue a certificate to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if the Commission finds that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied:

* * * * * * * * *

Sec. 309(d) Such certificate shall specify the route or routes over which, or the ports to and from which, such carier is authorized to operate, and, at the time of issuance and from time to time thereafter, there shall be attached to the exercise of the privileges granted by such certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require, including terms, conditions, and limitations as to the extension of the route or routes of the carrier, and such other terms, and conditions, and limitations as are necessary to carry out, with respect to the operations of the carrier, the requirements of this part or those established by the Commission pursuant thereto: *Provided, however,* That no terms, conditions, or limitations shall restrict the right of the carrier to add to its equipment, facilities, or service within the scope of such certificate, as the development of the business and the demands of the public shall require, or the right of the carrier to extend its services over uncompleted portions of waterway projects now or hereafter authorized by Congress, over the completed portions of which it already operates, as soon as such uncompleted portions are open for navigation.

APPENDIX B.

Sec. 212(a) Certificates, permits, and licenses shall be effective from the date specified therein, and shall remain in effect until suspended or terminated as herein provided. Any such certificate, permit, or license may, upon application of the holder thereof, in the discretion of the Commis-

sion, be amended or revoked, in whole or in part, or may upon complaint, or on the Commission's own initiative, after notice and hearing, be suspended, changed, or revoked, in whole or in part, for willful failure to comply with any provision of this part, or with any lawful order, rule or regulation of the Commission promulgated thereunder, or with any term, condition, or limitation of such certificate, permit, or license: *Provided, however,* That no such certificate, permit or license shall be revoked (except upon application of the holder) unless the holder thereof willfully fails to comply, within a reasonable time, not less than thirty days, to be fixed by the Commission, with a lawful order of the Commission, made as provided in section 204(c), commanding obedience to the provision of this part, or to the rule or regulation of the Commission thereunder, or to the term, condition, or limitation of such certificate, permit, or license, found by the Commission to have been violated by such holder: *And provided further,* That the right to engage in transportation in interstate or foreign commerce by virtue of any certificate, permit, license, or any application filed pursuant to the provisions of section 206, 209, or 211, or by virtue of the second proviso of section 206(a) or temporary authority under section 210(a), may be suspended by the Commission, upon reasonable notice of not less than fifteen days to the carrier or broker, but without hearing or other proceedings, for failure to comply, and until compliance, with the provisions of section 211(c), 217(a), or 218(a) or with any lawful order, rule, or regulation of the Commission promulgated thereunder.

p. 7, 8

SUPREME COURT OF THE UNITED STATES

No. 61.—October Term, 1946.

United States and Interstate Commerce Commission, Appellants, v. Seatrain Lines, Inc.	Appeal from the District Court of the United States for the District of Delaware.

[January 6, 1947.]

Mr. Justice Black delivered the opinion of the Court.

Seatrain is and long has been a common carrier of goods by water. Its harbor facilities and vessels have been constructed to enable it to perform a distinctive type of water carriage. Loaded railroad cars can be hoisted and transported in its vessels, thereby eliminating such things as trouble, time and breakage, said to be incident to loading and unloading goods from railroad cars. See *United States* v. *Pennsylvania R. R.*, 323 U. S. 612. Seatrain vessels also have tank space for carriage of liquid cargoes in bulk.[1]

Part III of the Interstate Commerce Act, 54 Stat. 929, 49 U. S. C. § 901, *et seq.*, subjected water carriers to the jurisdiction of the Interstate Commerce Commission. Section 309 (a) of that Act required them to obtain certificates of public convenience and necessity from the Commission. The same section contains a proviso commonly referred to as the grandfather clause. It provides that any water carrier, with an exception not here material, which was in bona fide operation as a common carrier by water on January 1, 1940, shall be entitled to a certificate to continue operations over the route or routes which it had been serving previous to that date without determination by the Commission of the question of public convenience and necessity.

[1] For a description of Seatrain equipment, see Investigation of Seatrain Lines, Inc., 195 I. C. C. 215, 218–222.

May 28, 1941, Seatrain filed two applications with the Commission to obtain certificates for two different routes, one of which it had operated since 1932, and another which it had begun to operate in 1940 shortly after passage of the water carrier provisions. Seatrain's application described its operation on each route as that of a "common carrier by water of commodities generally." After due notice had been given to all interested parties, Division 4 of the Commission conducted investigations, satisfied itself as to the right of Seatrain to be granted both applications under the provisions of the Act, made appropriate findings, and concluded that Seatrain was entitled to engage in transportation on both the routes as "a common carrier by water of commodities generally." A single certificate to carry "commodities generally between the ports of New York, New Orleans, and Texas City, by way of the Atlantic Ocean and the Gulf of Mexico" was accordingly issued to Seatrain. By its terms it became effective August 10, 1942, subject "to such terms, conditions, and limitations as are now or may hereafter be, attached to the exercise of such authority by the Commission."

A year and a half later, January 27, 1944, the Commission, on its own motion, ordered that the proceedings be reopened for the purpose of determining whether the 1942 certificate should not be modified so as to deprive Seatrain of the right to carry commodities generally. Seatrain appeared and moved to vacate and rescind the Commission's order to reopen the proceedings on the ground that the Commission was without statutory authority to make the alteration proposed. Seatrain's motion was rejected. At the subsequent hearing on the proposed modification, Seatrain declined to offer evidence, resting its case entirely on the Commission's lack of authority to reconsider and alter the original certificate. After argument, the Commission entered an order canceling the former certificate and directing that a different one be issued. 260 I. C. C.

430. The proposed new certificate in effect deprived Seatrain of the right to carry goods generally between the ports it served, and limited it to operations only "as a common carrier by the 'Seatrain' type of vessel, in interstate or foreign commerce, in the transportation of liquid cargoes and bulks; of empty railroad cars; and of property loaded in freight cars received from and delivered to rail carriers and transported without transfer from freight cars between the ports of New York, N. Y., New Orleans, Louisiana, and Texas City, Texas."

Seatrain then brought this action before a three-judge District Court under 28 U. S. C. §§ 41 (28), 47, to set aside the Commission's order. The District Court set aside the order on the ground that the Commission had exceeded its statutory authority in reopening the proceeding and altering the certificate. The District Court further held that even if the Commission would have had power under different circumstances to alter a certificate, it should not have done so in this case where, as the Court found from evidence before it but which had not been before the Commission, Seatrain had expended large sums of money in reliance upon the complete validity of its certificate. 64 F. Supp. 156. We need not consider the Commission's objection to the District Court's admission of evidence not heard by the Commission since we agree with the District Court that the Commission was without authority to cancel this certificate.

In altering Seatrain's certificate, the Commission held that a certificate authorizing the carriage of "commodities generally" does not embrace the right to carry loaded or unloaded railroad cars; that consequently the original certificate granted Seatrain actually deprived it of any future right to carry railroad cars—its chief business; that issuance of the original certificate to carry commodities generally was consequently an inadvertent error patent on the face of the record which the Commission has the right

and power to change at any time the matter comes to its attention. But Seatrain argues that, far from restoring the right to which it was entitled under the original proceedings, the new order actually results in a drastic limitation on the nature of the equipment and service Seatrain is privileged to employ in loading and carrying freight, and could bar delivery or receipt of freight to or from any consignees except railroads.

We need not determine the Commission's statutory power to correct clerical mistakes, since we are persuaded from Seatrain's applications for its certificates, from the information supplied to the Commission indicating that Seatrain had long transported goods of all kinds loaded in freight cars to consignees other than railroads, from the findings of the Commission, and from the course of the earlier decisions of the Commission regarding Seatrain, that the issuance of the original certificate was not an "inadvertent" error which the Commission's subsequent action was intended to correct. For all these indicate that prior to and at the time of the issuance of the Seatrain certificate it was the understanding of Seatrain and the Commission that its transportation of "commodities generally" included carriage of freight cars and that carriage of freight cars would not exclude carriage of commodities generally. Moreover, the Seatrain application was not reopened for consideration by the Commission until its decision in *Foss Launch & Tug Co.*, 260 I. C. C. 103, decided December 18, 1943. There the Commission pointedly ruled for the first time that a certificate to carry "commodities generally" did not authorize water carriage of loaded or unloaded freight cars—so-called "car-ferry service." Thus it seems apparent that the Seatrain proceedings were reopened not to correct a mere clerical error, but to execute the new policy announced in the *Foss* case. This conclusion is supported by the fact that in prior proceedings involving Seatrain, the Commission had re-

jected the contention that Seatrain's vessels could be classed as "car ferries," and had concluded that they were ocean going water carriers.[2]

Since the proceedings apparently were not reopened to correct a mere clerical error but were more likely an effort to revoke or modify substantially Seatrain's original certificate under the new policy announced in the *Foss* case, the question remains whether the Act authorizes such alterations. The water carrier provisions are part of the general pattern of the Interstate Commerce Act which grants the Commission power to regulate railroads and motor carriers as well as water carriers.[3] The Commission is authorized to issue certificates to all three types of carriers. But it is specifically empowered to revoke only the certificates of motor carriers. Section 212 (a), Part II, Interstate Commerce Act, 49 Stat. 555, 49 U. S. C. § 312 (a). In fact, when the water carrier provisions were pending in Congress, the Commission's spokesman, Commissioner Eastman, seems specifically to have requested the Congress to include no power to revoke a certificate. The Commissioner explained that while the power to revoke motor carriers' certificates was essential as an effective means of enforcement of the motor carrier section, it was not necessary to use such sanctions in the regulation of water carriers.[4] It is contended nonetheless

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[2] See *Investigation of Seatrain Lines, Inc.*, *supra*; *Seatrain Lines, Inc.* v. *Akron C. & Y. Ry.*, 226 I. C. C. 7; *Hoboken Manufacturers R. R.* v. *Abilene & So. Ry. Co.*, 248 I. C. C. 109, but see Commissioner Patterson dissenting, *id.* at 120.

[3] 24 Stat. 379 (as amended), 49 U. S. C. § 1 *et seq.* (railroads); 49 Stat. 543, 54 Stat. 919, 49 U. S. C. § 301 *et seq.* (motor carriers); 54 Stat. 929, 49 U. S. C. § 901 *et seq.* (water carriers).

[4] Commissioner Eastman, Chairman of the Commission's Legislative Committee, reporting to the Senate Committee on Interstate and Foreign Commerce on S. 2009 on January 29, 1940, stated, "This bill leaves section 212 (a) unchanged and has no corresponding provision in the new part III. While there is room for argument we are inclined

that the Commission has greater power to revoke water carrier certificates, where Congress granted no specific authority at all, than to cancel and revoke motor carrier certificates where specific but limited authority was granted. But in ruling upon its power to revoke motor carrier certificates, the Commission itself has held that unless it can find a reason to revoke a motor carrier's certificate, which reason is specifically set out in § 212 (a), it cannot revoke such a certificate under its general statutory power to alter orders previously made. *Smith Bros. Revocation of Order*, 33 M. C. C. 465.

It is argued, however, that this proceeding does not effect a partial revocation of Seatrain's certificate, but is merely an exercise of the Commission's statutory power under § 309 (d) to fix "terms, conditions and limitations" for water carrier certificate holders. Whether the Commission could, under this authority, have imposed a restriction in an original certificate as to the type of service a water carrier could utilize to serve its shippers best is by no means free from doubt. Yet the alleged authority to alter a certificate after it has been finally granted so as to limit the type of service is certainly no greater than the Commission's authority to limit the type of service when issuing the original certificate. It is of some significance that § 208 which prescribes the authority of the Commission in granting certificates to motor carriers authorizes the Commission to "specify the service to be ren-

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to believe that provision for the revocation or suspension of water-carrier certificates is not essential if adequate penalty provisions are provided for violation of part III. Revocation or suspension, in the case of motor carriers, is believed to be the most effective means of enforcement since there are so many such carriers and the operations of the great majority are so small, that enforcement through penal actions in courts presents many practical difficulties, but this is not true of water carriers."

dered" by those carriers. But § 309 which empowers the Commission to grant certificates to water carriers does not authorize the Commission to specify "the service to be rendered." Furthermore, § 309 (d) relating to water carrier certificates specifically provides "That no terms, conditions, or limitations shall restrict the right of the carrier to add to its equipment, facilities, or service within the scope of such certificate, as the development of the business and the demands of the public shall require . . ." The language of this section would seem to preclude the Commission from attaching terms and conditions to a certificate which would deprive the public of the best type of service which could be rendered between ports by a water carrier. In view of this difference between the statutory authority of the Commission to prescribe the service of water carriers and of motor carriers, our decisions relating to the Commission's power as to motor carriers in this respect [5] are not controlling as to the Commission's power to regulate the details of the service of water carriers. We can find no authority for alteration of Seatrain's certificate from the Commission's power to fix "terms and conditions."

Nor do we think that the Commission's ruling was justified by the language of § 315 (c) which authorizes it to "suspend, modify, or set aside its orders under this part under such notice and in such manner as it shall deem proper." That the word "order", as here used, was intended to describe something different from the word "certificate" used in other places, is clearly shown by the way both these words are used in the Act. Section 309 describes the certificate, the method of obtaining it, and its

[5] *Chicago St. P. & M. & O. Ry. v. U. S.*, 322 U. S. 124; *Crescent Express Lines v. U. S.*, 320 U. S. 401; *Noble v U. S.*, 319 U. S. 88. See also *Smith Bros. Revocation of Certificate*, 33 M. C. C. 465; *Quaker City Bus Co.*, 38 M. C. C. 603.

scope and effect, but it nowhere refers to the word "order." Section 315 of the Act, having specific reference to orders, and which in subsection (c), here relied on, authorizes suspension, alteration, or modification of orders, nowhere mentions the word "certificate."[6] It is clear that the "orders" refered to in 315 (c) are formal commands of the Board relating to its procedure and the rates, fares, practices, and like things coming within its authority. But as the Commission has said, as to motor carrier certificates, while the procedural "orders" antecedent to a water carrier certificate can be modified from time to time, the certificate marks the end of that proceeding.[7] The certificate, when finally granted, and the time fixed for rehearing it has passed, is not subject to revocation in whole or in part except as specifically authorized by Congress. Consequently, the Commission was without authority to revoke Seatrain's certificate. That certificate, properly interpreted, authorized it to carry commodities generally, including freight cars on the routes for which the certificate originally issued. The judgment of the District Court is

Affirmed.

MR. JUSTICE RUTLEDGE concurs in the result.

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[6] And §§ 316 and 317 of the Act pointedly treat an order as one thing and a certificate as another.

[7] See *Smith Bros. Revocation of Certificate, supra, Quaker City Bus Co., supra.*